

A Light in Digital Darkness: Public Broadband after Tennessee v. FCC

Mikhail Guttentag
Yale Law School

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yjolt>

Part of the [Computer Law Commons](#), [Intellectual Property Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Mikhail Guttentag, *A Light in Digital Darkness: Public Broadband after Tennessee v. FCC*, 20 YALE J.L. & TECH ().
Available at: <https://digitalcommons.law.yale.edu/yjolt/vol20/iss1/6>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law and Technology by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

A Light in Digital Darkness: Public Broadband after Tennessee v. FCC

Mikhail Guttentag¹

20 YALE J. L. & TECH. 311 (2018)

Ten years ago, the city of Chattanooga, Tennessee built its own high-speed Internet network, and today Chattanooga's publicly owned Internet infrastructure ("public broadband" or "municipal broadband") is faster and more affordable than almost anywhere else in the world. In this Article, I make the case for why other communities currently underserved by private broadband providers should consider building their own high-speed broadband networks and treating Internet as an essential public service akin to water or electricity, and I explore means by which these communities can overcome the legal and political hurdles they may face along the way.

¹ J.D., Yale Law School. My deepest thanks for the guidance of professors Alvin Klevorick, David Schleicher, and Gordon Silverstein; for the feedback and encouragement of Olevia Boykin, Ariel Dobkin, Paul Henderson, Lina Khan, and Theodore Rostow; for the editing of the *Yale Journal of Law and Technology*, particularly editors Anderson Christie, Allison Douglass, and Aislinn Klos; and for Mayor Andy Berke of Chattanooga, Tennessee, who warmly answered a law student's cold e-mail and invited him to check out his city. This Article is dedicated to my former students and coworkers at Heights High School in Houston, Texas, who bring light to darkness, digital and otherwise, and inspire this work. All errors are my own.

TABLE OF CONTENTS

INTRODUCTION	314
I. THE COSTS OF LIMITING CITIES TO PRIVATE BROADBAND...	320
A. <i>The Lack of Competition in the Last Mile</i>	321
1. The Internet's Brief Competitive Beginning	322
B. <i>The Major Drivers of Digital Divides</i>	324
II. THE PUBLIC BROADBAND ALTERNATIVE.....	327
A. <i>Envisioning Public Broadband as a Local Utility</i>	329
1. Arguments against Public Broadband	331
2. Which Places Could Be Well-Served by Public Broadband	335
B. <i>Public Broadband in Urban Areas</i>	336
C. <i>Will President Trump's FCC Support Public Broadband?</i>	339
III. OVERCOMING LEGAL BARRIERS TO PUBLIC BROADBAND ..	340
A. <i>State-Based Restrictions on Public Broadband</i>	342
B. <i>Congress and the Community Broadband Act</i>	344
C. <i>FCC Regulatory Authority</i>	346
1. Preemption of State Laws Under Section 253	346
2. Removing Barriers to Investment, Deployment, and Competition Under Section 706.....	347
3. Courts Preempt FCC Preemption	348
IV. <i>NIXON V. MISSOURI MUNICIPAL LEAGUE: THE LOSS OF SECTION 253</i>	350
A. <i>The Eighth Circuit Unanimously Overturns the FCC</i> 355	
1. Section 253(a) is a "Plain Statement"; the FCC Creates Ambiguity Where None Exists	355
2. The FCC Unduly Narrows the Meaning of the Modifier "Any"	356
3. Rejecting the D.C. Circuit's <i>Abilene</i> Decision, Creating the Circuit Split	357
B. <i>The Supreme Court Limits Section 253</i>	357
1. Majority Opinion: FCC Cannot Preempt Under Section 253, Mostly for Prudential Reasons	357
2. Justices Scalia and Thomas's Surprising Concurrence, on a Textual Basis	359
3. Justice Stevens' Dissent: Section 253 Means What It Says	361
4. The Lasting <i>Missouri Municipal League</i> Legacy: Restricting Public Broadband.....	363
V. <i>TENNESSEE V. FCC: THE LIMITS OF SECTION 706</i>	365
A. <i>The New FCC Grants Preemption, but Under Section 706</i> 366	
B. <i>The Sixth Circuit Overturns The FCC's Section 706</i>	

<i>Attempt</i>	370
VI. CONCLUSION: PUBLIC BROADBAND'S PATH AHEAD	373

**INTRODUCTION:
PUBLIC BROADBAND AND PUBLIC POWER**

“Failure to provide broadband to rural areas of America is a death sentence for those communities. They cannot compete economically without access to broadband.”

—United States Senator Angus King
(I-ME)²

“We see broadband in the 21st century as electricity was in the 20th.”

—Danna Bailey (Vice President,
Chattanooga EPB)³

Internet can be delivered like other publicly funded services, such as water, electricity, sewers, and roads.⁴ To date, Internet provision is left almost entirely to the private sector, leaving many places without affordable or high-speed service. However, there are a growing number of municipalities in the United States who have built their own high-speed Internet networks and offer it like a public utility. More cities should join them.

Many communities currently underserved by Internet providers—rural areas especially—were once underserved by private electricity providers that offered electricity to big cities and wealthy customers but left the rest of the country behind.⁵ These communities formed locally owned electric utilities to

² Mal Leary, *Angus King, Senators Want Improved Rural Broadband*, ME. PUB. (July 13, 2016), <http://mainepublic.org/post/angus-king-senators-want-improved-rural-broadband> [<http://perma.cc/HHT5-N77K>].

³ Henry Grabar, *Republicans Are Coming Around to This Public Internet Idea*, SLATE (Sept. 1, 2016, 1:05 PM), http://www.slate.com/blogs/future_tense/2016/09/01/public_broadband_is_a_bipartisan_issue_now.html [<http://perma.cc/ML84-6XZA>].

⁴ See Jeff Stricker, Note, *Casting a Wider Net: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified*, 81 GEO. WASH. L. REV. 589, 614 (2013) (“The only unique feature of telecommunications service provision by a government entity as compared to other government-provided services (such as electricity, water, sewers, and roads) is that the telecommunications industry is today predominantly administered by the private sector.” (footnote omitted)).

⁵ See D. Stan O’Loughlin, *Preemption or Bust: Fear and Loathing in the Battle over Broadband*, 28 CARDOZO L. REV. 479, 482-83 (2006) (“Beginning in the 1880s, electric power in the United States was provided primarily by large, private electric companies . . . private power companies did not consider rural electrification to be economically feasible and focused their resources on the more profitable urban market, leaving most of the country’s smaller cities and rural areas underserved or totally without access to electricity.” (footnotes omitted)).

provide electricity at affordable rates and wider availability than service from private providers.⁶ Franklin Delano Roosevelt made public power a central part of his successful 1932 Presidential campaign,⁷ and once elected, he created the Tennessee Valley Authority to bring affordable electricity to rural areas.⁸ Today, more than two thousand communities in the United States provide their own electricity, including cities like Seattle, San Antonio, and Los Angeles.⁹ All told, today more than one in four Americans purchase electricity service from a publicly owned power system or a nonprofit cooperative,¹⁰ and the rest purchase electricity from price-regulated suppliers.

Like electricity in the last century, Americans increasingly see universal, affordable access to broadband Internet as urgent and important for local economies, education, democracy, and good health. A recent study found that nine in ten Americans believe at-home broadband is either “essential” (49%) or “important” (41%), and only one in ten respondents said it was neither.¹¹ Another poll showed that two-thirds of

⁶ See David W. Penn, *Competition, the Consumer, and Local Decision Making: Public Power's Important Role*, 10 ELECTRICITY J. 30, 31 (1997) (“Public power utilities are a striking example of the institution of cities themselves—citizens’ decisions as to which services they choose to have their local government provide.”).

⁷ See, e.g., Franklin D. Roosevelt, Campaign Address in Portland, Oregon on Public Utilities and the Development of Hydro-Electric Power (Sept. 21, 1932), <http://www.presidency.ucsb.edu/ws/?pid=88390> [<http://perma.cc/SU74-7BYA>] (“Electricity is no longer a luxury. It is a definite necessity. It lights our homes, our places of work and our streets. It turns the wheels of most of our transportation and our factories. In our homes it serves not only for light, but it can become the willing servant of the family in countless ways. It can relieve the drudgery of the housewife and lift the great burden off the shoulders of the hardworking farmer. I say ‘can become’ because we are most certainly backward in the use of electricity in our American homes and on our farms What prevents our American people from taking full advantage of this great economic and human agency? The answer is simple. It is not because we lack undeveloped water power or unclaimed supplies of coal and oil. The reason is that we cannot take advantage of our own possibilities. The reason is frankly and definitely that many selfish interests in control of light and power industries have not been sufficiently far-sighted to establish rates low enough to encourage widespread public use.”).

⁸ Adam Cohen, *Roosevelt Understood the Power of a Public Option*, N.Y. TIMES (Nov. 30, 2009), <http://www.nytimes.com/2009/12/01/opinion/01Tue4.html> [<http://perma.cc/JAD8-3Z6T>].

⁹ SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 258 (2013).

¹⁰ *America's Electric Cooperatives: 2017 Fact Sheet*, NAT'L RURAL ELEC. COOP. ASS'N (Jan. 31, 2017), <http://www.electric.coop/electric-cooperative-fact-sheet> [<http://perma.cc/3Z9Z-YZ7X>].

¹¹ See Kenneth Olmstead et al., *Americans Have Mixed Views on Policies Encouraging Broadband Adoption*, FACT TANK (Apr. 10, 2017), <http://www.pewresearch.org/fact-tank/2017/04/10/americans-have-mixed-views-on-policies-encouraging-broadband-adoption/> [<http://perma.cc/PP97-XB3B>].

Americans believe that not having at-home broadband “would be a *major disadvantage* to finding a job, getting health information or accessing other key information,” a nearly ten-percent increase over the previous five years.¹²

And yet, Internet access in much of America is dismal. Fifty percent of American households have access to only one Internet provider, with no competition to drive faster or more affordable service, and an additional ten percent of households (including nearly forty percent of households in rural areas) have no access to a broadband Internet provider¹³ at all.¹⁴ America’s dominant Internet Service Providers (ISPs)—such as Comcast, AT&T and Time Warner Cable—all rank among the country’s least popular companies,¹⁵ and with good reason: on average, United States residents pay more money for slower Internet than do people in most countries in the developed world.¹⁶

¹² JOHN B. HARRIGAN & MAEVE DUGGAN, PEW RES. CTR., HOME BROADBAND 2015 4 (2015), <http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf> [<http://perma.cc/AL48-ZQHG>].

¹³ This is under the FCC’s definition of broadband Internet as offering a download speed of twenty-five megabits per second and an upload speed of three megabits per second. See FED. COMM’NS COMM’N, 2016 BROADBAND PROGRESS REPORT 3 (2016), http://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf [<http://perma.cc/FN3B-6P2C>].

¹⁴ *Id.* at 38 tbl.6.

¹⁵ Karl Bode, *Broadband ISPs, CableCos Still Least Liked of Any US Industry*, DSLREPORTS (May 27, 2016, 9:04 PM), <http://www.dslreports.com/shownews/Broadband-ISPs-CableCos-Still-Least-Liked-of-Any-US-Industry-137051> [<http://perma.cc/5R3A-YERM>] (“[B]roadband ISPs and cable companies continue to have the worst customer satisfaction ratings of any industry in the United States.”).

¹⁶ See EXEC. OFFICE OF THE PRESIDENT, COMMUNITY-BASED BROADBAND SOLUTIONS: THE BENEFITS OF COMPETITION AND CHOICE FOR COMMUNITY DEVELOPMENT AND HIGH SPEED INTERNET ACCESS 10 (2015), http://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf [<http://perma.cc/6ZE4-75EU>] (noting that when twenty-four United States and international cities were compared, “the median monthly price offered at each Internet speed level in the U.S. was higher than international peers, often by 50 percent or more.”); see also John Aziz, *Why Is American Internet so Slow?*, WEEK (Mar. 5, 2014), <http://theweek.com/articles/449919/why-american-internet-slow> [<http://perma.cc/5LHT-JYE8>] (“According to a recent study by Ookla Speedtest, the U.S. ranks a shocking 31st in the world in terms of average download speeds.”); Hannah Yi, *This Is How Internet Speed and Price in the U.S. Compares to the Rest of the World*, PBS NEWSHOUR (Apr. 26, 2015, 12:54 PM), <http://www.pbs.org/newshour/world/internet-u-s-compare-globally-hint-slower-expensive> [<http://perma.cc/EU83-V8MA>] (“Even though the Internet was invented in the United States, Americans pay the most in the world for broadband access. And it’s not exactly blazing fast. For an Internet connection of 25 megabits per second, New Yorkers pay about \$55—nearly double that of what residents in London, Seoul, and Bucharest, Romania, pay. And residents in cities such as Hong Kong, Seoul, Tokyo and Paris get connections nearly eight times faster.”).

Although federal law requires every American be given access to phone service, along with other services like water and electricity, there is no such law ensuring universal access to broadband.¹⁷ Fully one-third of Americans do not subscribe to at-home broadband access, and, of non-subscribers, the overwhelming plurality cite cost as the limiting factor.¹⁸ Because most Americans cannot count on their local government to provide broadband service or regulate prices, they are left with “the worst of both worlds in the broadband industry: no competition and no regulation.”¹⁹

In response to America’s lagging Internet infrastructure, some communities and lawmakers have begun to form public and public-private partnerships to provide Internet service as a utility service, delivering Internet access to residents at faster speeds and lower costs than before.²⁰

Recent polling suggests that these efforts, or at least the right to undertake them, enjoy overwhelming bipartisan support. Seven in ten Americans believe local governments should have the right to build their own broadband networks, including approximately two-thirds of Republicans and three-quarters of Democrats.²¹ In 2015, the White House issued a report trumpeting these publicly owned broadband networks, describing affordable, high-speed Internet access as “critical to U.S. economic growth and competitiveness.”²² There are a growing number of successful publicly owned high-speed Internet networks in communities nationwide.²³

One example of a successful publicly owned Internet network lies in a small city in southeastern Tennessee. The city of Chattanooga quietly launched its publicly owned high-speed Internet network in 2010, and today its city-run Internet is faster and more affordable at its speed than almost any other

¹⁷ See CRAWFORD, *supra* note 9, at 12 (“When the telephone was the dominant medium of exchange, U.S. Law required that every American have access to a phone along with other utility services such as water and electricity.”).

¹⁸ HARRIGAN & DUGGAN, *supra* note 12, at 4.

¹⁹ CRAWFORD, *supra* note 9, at 270.

²⁰ See, e.g., HAROLD FELD ET AL., MEDIA ACCESS PROJECT, CONNECTING THE PUBLIC: THE TRUTH ABOUT MUNICIPAL BROADBAND 4 (2005), http://www.freepress.net/sites/default/files/fp-legacy/mb_white_paper.pdf [<http://perma.cc/W3NN-8SYX>] (“[L]ocal communities are finding they can get better service for less money if they do it themselves.”); see also EXEC. OFFICE OF THE PRESIDENT, *supra* note 16, at 18 (“[Public broadband networks] in places like Chattanooga, TN, and Lafayette, LA . . . have Internet speeds up to 100 times faster than the national average and deliver it at an affordable price.”).

²¹ See Olmstead et al., *supra* note 11.

²² EXEC. OFFICE OF THE PRESIDENT, *supra* note 16, at 3.

²³ See, e.g., *Municipal FTTH Networks*, COMMUNITY NETWORKS (Feb. 6, 2017), <http://muninetworks.org/content/municipal-ftth-networks> [<http://perma.cc/Y7NZ-RNGT>].

network in the world.²⁴ Upgrading Chattanooga's grid and network cost \$330 million,²⁵ an investment that appears to be paying off handsomely: in its first five years it brought the city an estimated \$865 million in economic and social benefits, including thousands of new jobs.²⁶

Given Chattanooga's success, one might expect Tennessee and other states to seek to replicate these networks in other cities. Depending on the community's goals, it need not even operate or manage the network it builds. A single municipal network could host a large number of competing ISPs, if it finances the initial construction of the network (connecting high-speed fiber-optic cables to homes, via its electric grid or a similar network), and then leases those connections to competing ISPs.²⁷ This model is like an airport: the community finances the network (the airport), then leases the airport's connections (gates) to private ISPs, who compete with each other over providing service to customers.

-
- ²⁴ Edward Wyatt, *Fast Internet Is Chattanooga's New Locomotive*, N.Y. TIMES (Feb. 3, 2014), <https://www.nytimes.com/2014/02/04/technology/fast-internet-service-speeds-business-development-in-chattanooga.html> [<http://perma.cc/EKP7-ZRHE>] ("‘Gig City,’ as Chattanooga is sometimes called, has what city officials and analysts say was the first and fastest—and now one of the least expensive—high-speed Internet services in the United States. For less than \$70 a month, consumers enjoy an ultrahigh-speed fiber-optic connection that transfers data at one gigabit per second. That is 50 times the average speed for homes in the rest of the country, and just as rapid as service in Hong Kong, which has the fastest Internet in the world.").
- ²⁵ Chattanooga's city-owned utility, EPB (formerly "Electric Power Board of Chattanooga"), covered the \$330 million cost in two ways: a \$111 million federal stimulus grant, and \$219 million in borrowed bonds. Notably, the savings produced from the smart grid, as well as the revenue from Internet connections, more than cover the grid's capital and operating cost. See DAVID TALBOT & MARIA PAZ-CANALES, MUN. FIBER PROJECT, SMART GRID PAYBACKS: THE CHATTANOOGA EXAMPLE 1 (2017), http://dash.harvard.edu/bitstream/handle/1/30201056/2017-02-06_chattanooga.pdf [<http://perma.cc/KMA9-DTUN>] ("Data show that the savings produced by the smart grid, plus revenue from access fees paid by the utility's Internet access business, more than cover the capital and operating costs of the smart grid. What's more, we estimate this would still be true even if the utility hadn't received a \$111.6 million federal stimulus grant, and instead borrowed the extra amount.").
- ²⁶ Dave Flessner, *EPB Fiber Optics Gives Chattanooga a Boost*, TIMES FREE PRESS (Sept. 16, 2015), <http://www.timesfreepress.com/news/business/aroundregion/story/2015/sep/16/epb-fiber-optics-gives-city-boost/325362> [<http://perma.cc/38RK-683H>] ("An EPB-commissioned study by UTC's Department of Finance estimates EPB's smart grid and fiber optic network has helped add at least 2,800 jobs and pumped an extra \$865.3 million into the local economy over the past four years by cutting power outages, improving data connections, lowering power bills and attracting businesses to the self-described 'Gig City.'").
- ²⁷ See Susan Crawford, *Google Fiber Was Doomed from the Start*, WIRED (Mar. 14, 2017), <http://www.wired.com/2017/03/google-fiber-was-doomed-from-the-start/> [<http://perma.cc/MYC2-Z53S>] (describing what this model might look like).

Instead, Tennessee and nineteen other states have made it harder, not easier, to build local networks like the one in Chattanooga. Those state legislatures passed laws that ban or restrict their cities' abilities to provide community-financed Internet service, commonly referred to as "public broadband" or "municipal broadband."²⁸ The two phrases are used interchangeably here, since "public broadband" need not be administered by a municipality.²⁹

Some cities hoped that the FCC would help them overcome these restrictions, since Congress in 1996 gave the FCC authority to preempt state laws that restrict "any entity" from providing broadband. However, the Supreme Court ruled in 2004 that Congress had not made it sufficiently clear that a municipality could be an "entity" providing service,³⁰ effectively barring municipalities in those states from providing broadband. Over a decade later, the FCC tried a different way to help cities preempt state-level restrictions on municipal broadband, but in the August 2016 decision *Tennessee v. FCC*, a federal court held that the FCC lacked the authority to do that as well.³¹

These two decisions have left a number of cities that might benefit most from municipal broadband without the means to provide it, unless they can convince state legislatures or Congress to overturn these restrictive state laws. Overturning the laws would require state legislatures to buck the deep-pocketed ISP lobbyists who pushed states to enact the restrictions in the first place, which complicates these efforts.

In this Article, I examine the state of broadband in America, including the lack of competition and drivers of digital divides. I argue that broadband could be offered as a public utility service akin to water or electricity, and make the case that more communities should follow the lead of

²⁸ LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 13 (2016), <http://fas.org/sgp/crs/misc/R44080.pdf> [<http://perma.cc/X4NM-CRHH>]; see also Zaid Jilani, *Killing Net Neutrality Has Brought on a New Call for Public Broadband*, INTERCEPT (Dec. 15, 2017, 5:17 PM) <http://theintercept.com/2017/12/15/fcc-net-neutrality-public-broadband-seattle/> [<http://perma.cc/EDV4-ZBBK>].

²⁹ One reason to favor "public broadband" instead of the term "municipal broadband" is that there is less risk that the term will lose its meaning as referring only to networks with some form of public funding. For example, the FCC's Broadband Deployment Advisory Committee recently used the phrase "municipal broadband" to also refer to entirely privately owned and operated networks, potentially confusing the term. See BROADBAND DEV. ADVISORY COMM., FED. COMM'NS COMM'N, STATE CODE FOR ACCELERATING BROADBAND INFRASTRUCTURE DEPLOYMENT AND INVESTMENT 50 (2018), <http://www.fcc.gov/sites/default/files/bdac-modelcode-012018.pdf> [<http://perma.cc/43YA-57E8>].

³⁰ See *infra* Part IV.

³¹ See *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016); *infra* Part V.

Chattanooga, and others, and build their own high-speed broadband networks. I look at how the Supreme Court's 2004 *Missouri Municipal League* decision emboldened ISPs to lobby states to restrict the growth of public broadband, and revisit Justice Stevens' lone dissent, a position which today looks increasingly prescient. The specter of *Missouri Municipal League* haunts efforts to build publicly owned broadband, and in light of the *Tennessee v. FCC* decision, I argue that *Missouri Municipal League* is due for review and reconsideration.

I conclude by arguing that advocates for public broadband should engage on all fronts to lift unnecessary restrictions on the public provision of broadband. Like electricity, broadband has become an essential service, and no community should be left in digital darkness.

I. THE COSTS OF LIMITING CITIES TO PRIVATE BROADBAND

"Here in Seattle, we don't rely on for-profit companies to provide our water or electricity. The Internet shouldn't be any different."

—Upgrade Seattle³²

Like roads, broadband Internet is essential infrastructure for the modern economy.³³ Without utility-style regulation or public provision in areas where the private market for broadband has failed, communities will continue to fall behind.

Like electricity in the late nineteenth century, the provision of Internet service today largely follows the profit motives of private providers.³⁴ These profit motives disfavor providing affordable high-speed service to less profitable poor or rural populations when compared to denser, higher-income neighborhoods.³⁵ Some scholars have argued that these market

³² See UPGRADE SEATTLE, <http://www.upgradeseattle.com> [<http://perma.cc/YB83-K6UA>].

³³ PENNY PRITZKER & TOM VILSAK, U.S. DEP'T OF AGRIC. & U.S. DEP'T OF COMMERCE, BROADBAND OPPORTUNITY COUNCIL REPORT AND RECOMMENDATIONS 12 (2015), http://obamawhitehouse.archives.gov/sites/default/files/broadband_opportunity_council_report_final.pdf [<http://perma.cc/UT6S-HZP3>] ("Broadband has steadily shifted from an optional amenity to a core utility for households, businesses and community institutions. Today, broadband is taking its place alongside water, sewer and electricity as essential infrastructure for communities.").

³⁴ See, e.g., Stricker, *supra* note 4, at 620 ("Broadband deployment is analogous to the deployment of electricity in the United States in the early twentieth century. In the 1880s, most electricity in the United States was supplied by large, private companies that did not view extending service to less densely populated areas as profitable or feasible and thus chose to ignore them in favor of urban markets." (footnote omitted)).

³⁵ The basic thinking behind this approach is that in most cases, the more

structures bolster the case for treating broadband Internet, at least in areas unserved by market competition, as a utility service akin to electricity or water.³⁶ Nonetheless, most communities have not extended this logic to broadband, and the overwhelming majority of communities rely on market competition incentives to drive broadband deployment and pricing. It takes just a cursory look to see why this approach has failed.

A. *The Lack of Competition in the Last Mile*

The theory that a free market will deliver competition in broadband provision is based on the idea that multiple ISPs will compete in the “last mile” through which a broadband connection travels. The last mile is the part of the Internet connection with which most consumers are familiar: when a consumer purchases Internet service from an ISP, that consumer is purchasing a last-mile Internet connection.³⁷ In other words, the last mile is “the part of the data's voyage that takes it from local utility poles or underground tubes, into your house, and through the cable that plugs into your [Internet router].”³⁸

customers a network serves, the more likely that network will recoup the initial investment. It is more expensive to serve remote areas, and because those areas are more sparsely populated, recouping the investment on the same timeframe as a more densely populated area (*ceteris paribus*) would require charging a greater monthly fee to remote residents, which could slow the rate of broadband adoption and further hinder investment recovery.

³⁶ See CRAWFORD, *supra* note 9, at 17 (“Utilities like water and electricity are natural monopoly services. So is telecommunications. It costs a great deal to set up a telecommunications system (and the U.S. government has helped immensely along the way by handing out franchises and access to rights-of-way to the corporate ancestors of today's giants) but very little to add one more revenue-producing customer, and at this point competitors to incumbent cable providers survive only by the sufferance of the local monopolist. But Americans persist in hoping for competition to emerge.”).

³⁷ See Myles Roberts, *Opening the Last Mile to Competition*, 4 VA. SPORTS & ENT. L.J. 309, 310-11 (2005) (“The Federal Communications Commission uses a road model to describe the national communications network to those unfamiliar with the technology. In the road model, the backbone of the network is equivalent to a multi-lane interstate highway; the middle mile of the network is a divided highway; the last mile is a local road; and the last 100 feet of the network is a driveway. The connection points along the network are equivalent to the intersections, on-ramps, and interchanges of the road system Both telecom and cable services are offered over separate last-mile facilities. On the telecom network, the signal enters the last mile from the middle-mile facilities at the collocation point where the signal is separated from other signals. From the collocation point, usually a switch located inside the carrier's central office, the signal travels . . . through the last 100 feet to the customer's premises.”).

³⁸ Adam Clark Estes, *Why America's Internet Is So Shitty and Slow*, GIZMODO (Mar. 10, 2015, 3:05 PM), <http://gizmodo.com/why-americas-internet-is-so-shitty-and-slow-1686173744> [<http://perma.cc/SF8R-GHBM>].

The high cost of last-mile infrastructure is a huge impediment for would-be market entrants and an equally large advantage for incumbents. Nearly all the costs of broadband provision lie in up-front capital expenditure in financing and constructing the initial last-mile connections.³⁹ Once these costs are paid, providing the service is relatively inexpensive, and the cost of adding additional customers is low. The up-front capital necessary to provide service deters new investment in broadband provision and gives incumbent providers little incentive to improve service.

Not long ago, the market for Internet service was competitive. It was competitive because it had rules. These regulations—the vestiges of the breakup of telephone monopolies—kept prices low and ensured that providers would have a chance to compete with one another. Politicians repealed these rules, and in the process cost the country its competitive market for Internet service. In understanding how these repealed rules once created competitive markets, we can better understand how to design and deploy new rules in the future that bring those markets back.

1. The Internet's Brief Competitive Beginning

The early market for Internet service was competitive. By 1998, nine in ten Americans could choose to purchase dial-up Internet service from *seven or more* ISPs,⁴⁰ a figure unimaginable today. Today, six in ten Americans have no choice in their broadband Internet provider: either there is only one provider or none at all.⁴¹ The market was competitive because of regulation held over from the twentieth-century breakup of “Mama Bell,” a telecommunications monopoly. When regulations were lifted, competition collapsed.

One major condition of the “Mama Bell” breakup was access requirements, which forced incumbent telephone operators to

³⁹ See, e.g., Stricker, *supra* note 4, at 596 (“Put simply, it is quite expensive to build out a wired broadband network. The nature of wired broadband deployment requires large up-front costs of construction, essentially capital expenditures, as broadband connections require running wires to customers’ homes or businesses. However, once these up-front deployment costs are paid, the network is relatively cheap to operate. Thus private ISPs price their service above transmission costs so as to recoup their capital outlay.” (footnotes omitted)).

⁴⁰ DEREK TURNER, FREEPRESS, DISMANTLING DIGITAL DEREGULATION: TOWARD A NATIONAL BROADBAND STRATEGY 7 & n.6 (2009), http://web.archive.org/web/20140919192630/https://www.freepress.net/sites/default/files/fp-legacy/Dismantling_Digital_Deregulation.pdf [<http://perma.cc/M2PN-Y94X>] (“Dial-up Internet went from a novelty to being available in almost every American household. Even those in remote rural areas had access to multiple, highly competitive Internet Service Providers (ISPs) by the end of the [1990s].”).

⁴¹ See FED. COMM’NS COMM’N, *supra* note 13, at 38.

lease access to their networks to competitors at reasonable rates. New ISPs, such as AOL and Earthlink, competed by offering “dial-up” Internet service through incumbent telephone companies’ last-mile copper telephone networks. But the competitive market did not last long, in large part because cable television providers did not have to follow these same rules.

Cable television companies like Comcast, Time Warner Cable, and so on also operated services—cable television and telephone—in the last mile. They began offering broadband, too, and with a big advantage over dial-up providers: their cables could carry Internet much faster than traditional telephone lines. Moreover, the FCC exempted these cable companies from the “common carriage” requirements imposed on telephone companies,⁴² meaning that any ISP hoping to compete at those speeds would have to build entirely new lines to connect their service to homes.⁴³

The FCC’s “common carriage” access requirements on telephone companies worked so well that the agency should have recognized the obvious solution to cable’s lack of competition: to extend those same access requirement rules to cable Internet providers. Instead, the George W. Bush-era FCC did the exact opposite. It looked at the “asymmetric regulation” between cable and telephone companies and decided to deregulate both. It exempted both cable and telephone companies from common-carriage rules, moving Internet provision away from a competitive market and ushering in the monopolistic and oligopolistic markets we see today.

The decision to deregulate telephone companies away from common-carriage regulations effectively killed the competitive dial-up market.⁴⁴ Telephone companies behaved as any

⁴² TURNER, *supra* note 40, at 9.

⁴³ Few would imagine, let alone invest in, a new company coming into their city and building a parallel competitive sewage system to compete with their existing provider. And yet rhetoric surrounding competition in the provision of broadband service often imagines several entrants engaging in initial construction and duplication of a competitor’s existing Internet service. See Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1716 (2006); see also Roberts, *supra* note 37, at 311 (“Just as it is cost-prohibitive to build two roads to the same driveway, it is cost-prohibitive to build additional communications networks along the last mile. As a result, the service providers who control the last mile are in a position to control consumers’ service choices and the prices of those services.”).

⁴⁴ See TURNER, *supra* note 40, at 42 (“The impetus behind [FCC Chairman Kevin Martin]’s desire to treat all broadband services the same was the perceived inefficiencies and market perversions stemming from ‘asymmetric regulation.’ The thinking was that since cable modem services were not subject to Title II or *Computer Inquiry* regulations, then neither should any other Internet access services, because to do so would create market inefficiencies. Never mind the fact that it was the FCC itself that created this

competitive business would, maximizing profit amidst the newfound lack of price constraints. They favored their own Digital Subscriber Line (“DSL”) Internet service, and denied access or set extremely high prices for any would-be competitive ISPs.⁴⁵

The FCC argued at the time that deregulating all Internet services would increase competition.⁴⁶ Instead, competition drastically decreased.⁴⁷

Without the FCC’s common-carriage regulations, AOL and other would-be providers could no longer lease existing networks to compete with incumbent companies, and few could afford the costs of building new last-mile infrastructure. One newspaper’s account reflected a nationwide experience: “The teeming ranks of ISPs offering dial-up service were replaced in the typical residential neighborhood by a broadband duopoly consisting of one cable operator selling cable modem service and one telephone company selling DSL.”⁴⁸

The startup cost to build new networks and offer service was even harder to justify and recoup in poorer or less densely populated areas, so the new Internet providers that did emerge tended to concentrate in wealthier areas already served by broadband providers.⁴⁹ Left alone, these market forces laid the groundwork for America’s present digital divides.

B. The Major Drivers of Digital Divides

The failure to ensure universal, affordable broadband

problem in the first place via its decisions regarding cable modem service.”).

⁴⁵ See *id.* at 9.

⁴⁶ See, e.g., FED. COMM’NS COMM’N, CHAIRMAN KEVIN J. MARTIN COMMENTS ON ADOPTION OF WIRELINE BROADBAND INTERNET ACCESS ORDER, 3-4 (Aug. 5, 2005), <http://transition.fcc.gov/meetings/080505/sharing.pdf> [<https://perma.cc/2FBW-22H8>] (“The Order that we adopt today . . . ends the regulatory inequities that currently exist between cable and telephone companies in their provision of broadband Internet services I believe that, with the actions we take today, consumers will reap the benefits of increased Internet access competition and enjoy innovative high-speed services at lower prices.”).

⁴⁷ See Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 837 (2012) (“The vast majority of residents obtain Internet access from one of just two providers in their local area: an effective duopoly in communities across the country controlled by the local incumbent cable provider and the incumbent telephone operator.”).

⁴⁸ Editorial, *Keeping Consumers, Not ISPs, in Control of the Internet*, L.A. TIMES (Dec. 4, 2015) <http://www.latimes.com/opinion/editorials/la-ed-net-neutrality-20151204-story.html> [<http://perma.cc/B2NA-ZSRK>].

⁴⁹ This inefficient allocation of new broadband competition towards well-served areas is another compelling reason for why poorer and/or rural municipalities might consider building municipal broadband networks. See Sylvain, *supra* note 47, at 836 (“One of the chief and guiding reasons for municipal broadband is the failure of private providers to deliver adequate service to poorer and lower density areas.”).

service created “digital divides” that today leave one-third of Americans without a subscription to at-home broadband Internet service.⁵⁰ Like electricity providers of old, unbound ISPs followed free market logic, serving neighborhoods that could pay the most or were cheapest to connect. Thus, the proportion of populations without access to broadband Internet is highest in counties with the lowest median household incomes, lowest population densities, highest rural population rates, and highest poverty rates.⁵¹

The primary factors driving digital divides are price and supply of affordable service, not lack of demand. Among non-broadband adopters, price sensitivity is “greatest among those who are most likely to see the advantages of a home broadband subscription”⁵²—meaning that households who would likely see benefits from broadband are priced out of service. Particularly in poor areas and communities of color, non-subscribers would “overwhelmingly subscribe if home access were more affordable.”⁵³ In other words, “[t]he adoption gap is an affordability gap.”⁵⁴

In American public schools, digital divides exacerbate educational inequities.⁵⁵ Just three percent of teachers of low-

⁵⁰ HERRIGAN & DUGGAN, *supra* note 12, at 2.

⁵¹ FED. COMM’NS COMM’N, *supra* note 13, at 42 tbl.9; *see also* Stricker, *supra* note 4, at 596 (“Internet Service Providers (ISPs) are reluctant to enter more remote or less populated markets From a business standpoint, this sort of capital expenditure is more easily justified in densely populated areas, as the more densely populated an area is, the more customers there are within range of the network and available to pay for it. Consequently, major metropolitan areas tend to have multiple private ISPs offering broadband service, because ISPs can more quickly recover their fixed costs of construction from the larger customer base.”).

⁵² HERRIGAN & DUGGAN, *supra* note 12, at 4 (“Non-broadband adopters who view a lack of home service as a major disadvantage are also more likely to cite the monthly cost of broadband as the primary reason they do not subscribe.”).

⁵³ *See* Letter from Derek Turner, Research Dir., Free Press, et al. to Ajit Pai, Chairman, Fed. Comm’ns Comm’n et al. 4-5 (Jan. 31, 2017), http://www.freepress.net/sites/default/files/legacy-policy/free_press_digital_divide_fcc_letter_final.pdf [<http://perma.cc/V2T2-CCGC>] (“Let us be clear: the lingering narrative that non-adopters simply do not want to go online is dead wrong, based on usage data and survey responses for families living in marginalized communities. As our research shows, low-income families and people of color lacking home access have a very high demand for it. Non-adopters in these demographic groups take extraordinary measures to go online elsewhere, and would overwhelmingly subscribe if home access were more affordable.” (footnotes omitted)).

⁵⁴ *Id.* at 5.

⁵⁵ In addition to survey data, I will state my own experience from four years as a high school teacher at a school serving students primarily from low-income households, from which the importance of at-home broadband access in achieving greater educational equity became evident. Assigning research papers that would develop online research and word processing skills requires students to either have at-home broadband access, or else live near enough to or have transportation to another source with broadband and a

income students reported that all or almost all of their students had sufficient access to digital tools they needed to complete school assignments at home, and fifty-six percent said digital tools are widening the gap between their most and least successful students.⁵⁶ Seven in ten teachers report assigning homework that requires access to broadband,⁵⁷ but “low-income homes with children are four times more likely to be without [at-home] broadband than their middle or upper-income counterparts.”⁵⁸ These discrepancies help explain why over eighty percent of teachers either agree or strongly agree with the proposition that digital tools are leading to greater disparities between affluent and disadvantaged schools and school districts.⁵⁹

In the context of local business development, comparing broadband to electricity is also instructive. Communities would struggle to attract and keep businesses if they could not offer businesses electricity at affordable rates, since electricity has become essential to the functioning of nearly every modern business. Affordable, high-speed broadband has become essential for many businesses too. If someone in a community without affordable high-speed broadband hopes to start a web-based business similar to Dropbox or Netflix, they almost certainly would have to build that business somewhere else.⁶⁰

computer, such as a local library. Many students in low-income households also have other responsibilities (taking care of family, after-school jobs, and so on) that made it especially difficult for those without at-home broadband to complete those assignments. Without these assignments, however, the same students are denied the opportunity to develop the skills that help prepare them for university-level success, where Internet-based research and writing skills are expected prerequisites.

⁵⁶ KRISTEN PURCELL ET AL., PEW RESEARCH CTR., HOW TEACHERS ARE USING TECHNOLOGY AT HOME AND IN THEIR CLASSROOMS 44-45 (Feb. 28, 2013), http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_TeachersandTechnologywithmethodology_PD_F.pdf [<http://perma.cc/88LQ-5KPN>].

⁵⁷ Jessica Rosenworcel, *How to Close the ‘Homework Gap’*, MIAMI HERALD (Dec. 5, 2014, 6:06 PM), <http://www.miamiherald.com/opinion/op-ed/article4300806.html> [<http://perma.cc/3G3J-EZ3Y>].

⁵⁸ John B. Horrigan, *The Numbers Behind the Broadband ‘Homework Gap’*, FACT TANK (Apr. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/04/20/the-numbers-behind-the-broadband-homework-gap> (“[L]owest-income households have the lowest home broadband subscription rates. Roughly one-third (31.4%) of households whose incomes fall below \$50,000 and with children ages 6 to 17 do not have a high-speed internet connection at home. This low-income group makes up about 40% of all families with school-age children in the United States By comparison, only 8.4% of households with annual incomes over \$50,000 lack a broadband internet connection at home.”).

⁵⁹ PURCELL ET AL., *supra* note 56, at 4. The feeling that digital tools widen disparities is most strongly felt among teachers serving either low-income or high-income student groups. *Id.* at 47.

⁶⁰ See, e.g., Maria Sudekum, *Google’s Ultra-Fast Internet Creates ‘Silicon Prairie’*, PORTLAND PRESS HERALD (Jan. 14, 2013),

The lack of broadband bears repeating: nearly four in ten Americans living in rural areas, and one in ten Americans overall, currently have no option—at any price—to subscribe to broadband access where they live.⁶¹

These digital divides—most pronounced among poor and rural communities, tribal areas, and senior citizens—represent a challenge and an opportunity for state and local governments hoping to bring residents and local businesses online to reap the numerous expected educational, economic, and social benefits of broadband access.⁶²

Many communities who are still waiting for market competition to deliver universal, affordable broadband access should consider whether that approach has failed. The need for that service is urgent. To bridge these digital divides and deliver affordable, high-speed broadband, those communities should take a closer look at networks in cities like Chattanooga, Tennessee, as well as the nearly one hundred other local governments that provide public broadband.⁶³

II. THE PUBLIC BROADBAND ALTERNATIVE

“I might call the right of people to own and operate their own utility something like this: a ‘birch rod’ in the cupboard to be taken out and used only when the ‘child’ gets beyond the point where a mere scolding does no good.”

<http://www.pressherald.com/2013/01/14/googles-ultra-fast-internet-creates-silicon-prairie/> [<http://perma.cc/Z8XM-Y2PC>] (“The advantage [of high-speed Internet] for startups is simple: A fast Internet pipe makes it easier to handle large files and eliminates buffering problems that plague online video, live conferencing and other network-intensive tasks.”).

⁶¹ FED. COMM’NS COMM’N, *supra* note 13, at 38 tbl.6.

⁶² See, e.g., Stricker, *supra* note 4, at 595-96 (“The benefits of high-speed Internet to both ordinary citizens and businesses are numerous and linked directly to broadband’s greater speeds. For individuals, broadband performs critical functions such as assisting people in finding employment and facilitating communication and education in addition to offering great convenience and entertainment value. Broadband also gives businesses the ability to expand their operations globally, find more and better customers and suppliers, streamline operations, advertise more efficiently, and recruit employees. The result is a substantial net benefit to the community, as communities with high-quality broadband networks are more likely to attract and retain businesses, offer greater educational opportunities, provide government services more efficiently, and attract tourists. Speed is key, as slower, non-broadband Internet connections render most of these benefits unobtainable either because of the time required to access the benefits or because the Internet products and services cannot be transmitted to users lacking broadband access.”).

⁶³ *Community Broadband Networks*, INST. FOR LOC. SELF-RELIANCE (Jan. 2015), <http://ilsr.org/wp-content/uploads/2015/02/cbbmap-fact-sheet.pdf> [<http://perma.cc/E2K8-6QPQ>].

—Franklin D. Roosevelt⁶⁴

To be clear: I do not argue that every community should, *per se*, build and manage a public broadband network.

First, the circumstances of any particular community should drive any decision about how it chooses to spend its funds. A community satisfied with its Internet service may rightfully decide not to spend public money on a broadband network.

Second, there is, of yet, no single model for a public broadband network, so such an argument would be insufficiently precise.⁶⁵ Some models involve full *public ownership* (where local governments build, finance, and operate the broadband network); others take the form of *public-private partnerships* (these come in many varieties, including when a local government builds the network but leases operating rights among several firms); still others experiment with *cooperative models* where every subscriber becomes a member-owner of the cooperative that owns the network,⁶⁶ and which, like rural electric and telephone cooperatives, may qualify for federal loans and grants from the U.S. Department of Agriculture.⁶⁷ Beyond different network models, services offered may also vary. Some municipalities provide phone service; others bundle Internet with cable television, run alongside electric grids, or extend service to nearby municipalities as well.⁶⁸

Most importantly, particular communities' needs vary from one to the next, and it is highly unlikely that there is a single

⁶⁴ Roosevelt, *supra* note 7.

⁶⁵ The phrase "municipal broadband" can have several meanings, but all should include at least some form of public ownership of the network. See KRUGER & GILROY, *supra* note 28, at 1 ("Municipal broadband (also sometimes referred to as 'community broadband') is a somewhat amorphous term that can signify many different ways that a local government might participate—either directly or indirectly—in the provision of broadband service to the local community. Municipal broadband models can include public ownership, public-private ownership, and a cooperative model."). But see *supra* note 29 (describing how a recent FCC working group's draft model code used "municipal broadband" to refer to private networks as well, adding confusion to the meaning of the term).

⁶⁶ See, e.g., SCOTT CARLSON & CHRISTOPHER MITCHELL, INST. FOR LOC. SELF-RELIANCE, RS FIBER: FERTILE FIELDS FOR NEW RURAL INTERNET COOPERATIVE 10 (Apr. 2016), <http://ilsr.org/wp-content/uploads/downloads/2016/05/RS-Fiber-Report-2016.pdf> [<http://perma.cc/HHB9-T7VJ>] ("Co-ops are self-governing, member-owned associations Anyone who takes services from RS Fiber is a member of the cooperative and can vote at its annual meeting. The co-op's structure allows the network's supporters to raise equity because non-patron members (i.e. equity investors) can participate in its ownership.").

⁶⁷ See *id.* at 15, 17.

⁶⁸ See KRUGER & GILROY, *supra* note 28, at 2.

model of broadband provision that most effectively fits all their varied needs.⁶⁹

For these reasons, it would make little sense to argue for publicly owned broadband *per se*. Even advocates for publicly owned electric utilities like Franklin D. Roosevelt did not favor that model in all instances.⁷⁰ Instead, in this section I aim to: (a) “normalize” the idea of public broadband distribution in context alongside other utilities and city services provided by public or nonprofit providers; (b) identify where municipalities ill-served by private broadband providers might benefit from some form of public broadband project; and (c) explain the hurdles a municipality hoping to build a broadband network may first need to overcome to do so.

A. *Envisioning Public Broadband as a Local Utility*

Local governments have political, economic and social interests in ensuring that everyone has affordable access to necessities like water and electricity. Many cities and counties empower publicly owned utilities to supply, manage and deliver water and electricity services as cost-efficiently as possible.⁷¹ Public provision of both electricity and water generally saves consumers money relative to provision by private providers.^{72,73} Local governments have a long history of

⁶⁹ See City of Wilson, 30 FCC Rcd. 2408, 2410 (2015) (“The actions that communities are taking to make certain their citizens have access to [broadband] infrastructure are varied No one solution works for all communities.”).

⁷⁰ See Roosevelt, *supra* note 7. (“I do not hold with those who advocate Government ownership or Government operation of all utilities.”).

⁷¹ Eighty-seven percent of Americans receive piped water from a publicly owned provider. See FOOD & WATER WATCH, THE STATE OF PUBLIC WATER IN THE UNITED STATES 4 (Feb. 2016), http://www.foodandwaterwatch.org/sites/default/files/report_state_of_public_water.pdf [<http://perma.cc/74BU-LANY>].

⁷² See Penn, *supra* note 6, at 33 (“[R]ates for public power customers have typically remained well below those of customers served by private utilities since federal comparison statistics began to be published with the end of World War II.”); see also AM. PUB. POWER ASS’N, 2015-2016 ANNUAL DIRECTORY & STATISTICAL REPORT 55, <http://web.archive.org/web/20160804162515/http://www.publicpower.org/files/PDFs/PublicPowerCostsLess1.pdf> [<http://perma.cc/W6DE-X65S>] (“Residential customers in IOU service territories paid average rates that were 14 percent above those paid by customers of publicly owned systems during 2013.”). But see Jim Malewitz, *Deregulated Electricity a Mixed Bag for Consumers*, TEX. TRIB. (Aug. 12, 2015, 7:00 AM), <http://www.texastribune.org/2015/08/12/report-deregulated-electric-utilities-narrowing-pr> [<http://perma.cc/CJ7B-LEP4>].

⁷³ A review of the 500 largest U.S. community water systems found that on average, for-profit water utilities charged 59 percent more than large publicly owned systems. See FOOD & WATER WATCH, *supra* note 71, at 7; see also

spending tax dollars on local infrastructure to provide residents with city services (e.g., trash removal, drinking water, sewage) that private companies might have provided instead.⁷⁴

Given this history, there seems like there should be little that is new or particularly controversial about communities providing broadband, at least relative to public provision of other utilities. As the Congressional Research Service recently wrote, “[m]unicipal broadband follows the tradition of municipal utilities, which have been providing basic utilities such as water, natural gas, and electricity for many years.”⁷⁵

Moreover, public broadband networks can bring underserved communities high-speed broadband at more affordable rates. Once networks are installed and financing bonds are repaid, there is low marginal cost in service and adding new subscribers. Unlike Comcast and other privately-traded ISPs, a public broadband network need not set high prices in order to maximize profit margins for outside shareholders.⁷⁶ Its revenue can be reinvested in the community: upgrading the network, paying for city services, or subsidizing Internet access for low-income or fixed-income residents. Whereas private providers tend to favor serving middle- to upper-income households,⁷⁷ a public broadband network could be deployed to meet distributional needs. Public broadband can and has induced private providers to lower prices⁷⁸ and increase speeds,⁷⁹ provide consumer choice,⁸⁰ and

Richard G. Little & Wenonah Hauter, *Are We Better Off Privatizing Water?* WALL STREET J. (Oct. 8, 2012), <http://www.wsj.com/articles/SB10000872396390443816804578002280926253750?mg=id-wsj> [<http://perma.cc/9KVV-QZP7>] (“Private water providers are businesses. They are motivated mainly by their bottom line. The pressure to deliver high rates of return for shareholders drives them to cut corners when they are operating under contracts, and to drive up costs when they are operating as regulated utilities. The latter is a well-established phenomenon known as the Averch-Johnson Effect, named for the economists who first modeled it in the 1960s.”).

⁷⁴ See Travis, *supra* note 43, at 1795-96.

⁷⁵ See KRUGER & GILROY, *supra* note 28, at 4.

⁷⁶ See Stricker, *supra* note 4, at 597-98 (“The benefits of affordable broadband access are so important to a community that making a profit should not be the overarching goal. The main purpose of municipal broadband should be to provide an increasingly necessary public service, not turn a profit.”).

⁷⁷ KRUGER & GILROY, *supra* note 28, at 4.

⁷⁸ See, e.g., DAN MAHONEY & GREG RAFERT, ANALYSIS GRP., BROADBAND COMPETITION HELPS TO DRIVE LOWER PRICES AND FASTER DOWNLOAD SPEEDS FOR U.S. RESIDENTIAL CUSTOMERS 1 (Nov. 2016), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/broadband_competition_report_november_2016.pdf [<http://perma.cc/2XRL-XVBA>] (“The presence of gigabit service in a Designated Market Area (DMA) is associated with a \$27 per month decrease in the average monthly price of broadband plans with speeds greater than 100 Mbps and less than 1 Gbps. This is equal to a reduction in approximately 25 percent of the monthly standard price.”).

⁷⁹ See, e.g., CHRISTOPHER MITCHELL, NEW RULES PROJECT, BREAKING THE

encourage local and regional economic development.⁸¹ For communities already served by a municipal electric utility, municipal broadband can be particularly efficient since “infrastructure costs can be shared across those two services, just as private cable companies leveraged their networks to provide Internet service.”⁸²

In sum, for many communities there are a number of reasons to consider a public broadband alternative to an inadequate broadband status quo. That said, it is also worth considering arguments presented by public broadband opponents.

1. Arguments against Public Broadband

Arguments against public broadband operate along a spectrum. At the far end is a view espoused by FCC Commissioner Michael O’Rielly: categorical opposition to any government entity offering broadband or any other communications services.⁸³ Commissioner O’Rielly’s position is

BROADBAND MONOPOLY 8 (May 2010), <http://muninetworks.org/sites/www.muninetworks.org/files/breaking-bb-monopoly.pdf> [<http://perma.cc/YY5Z-PJYU>] (“[P]ublic networks spurred investment by the incumbents, a trend that is replayed in every community that builds its own network In Colorado, Qwest and Comcast only built broadband in Longmont after the city announced a partnership with another company that would use public fiber to deliver broadband services. After Lafayette began building its fiber network, incumbent cable company Cox upgraded its offerings, noting ‘the people in this area have made it very clear they want faster speeds.’”); Jon Brodtkin, *Comcast Brings Fiber to City that It Sued 7 Years Ago To Stop Fiber Rollout*, ARS TECHNICA (Apr. 30, 2015, 6:10 PM), <http://arstechnica.com/business/2015/04/comcast-brings-fiber-to-city-that-it-sued-7-years-ago-to-stop-fiber-rollout> [<http://perma.cc/J4GE-UDCZ>] (describing Comcast’s steps to match the Chattanooga Electric Power Board’s steps).

⁸⁰ See, e.g., EXEC. OFFICE OF THE PRESIDENT, *supra* note 16, at 4.

⁸¹ See, e.g., BENGT G. MÖLLERYD, OECD, DEVELOPMENT OF HIGH-SPEED NETWORKS AND THE ROLE OF MUNICIPAL NETWORKS 25 (2015), <http://www.oecd-ilibrary.org/docserver/download/5jrql7rvns3-en.pdf> [<http://perma.cc/E97X-X96L>] (“[Municipal broadband networks] facilitate economic growth and development of new jobs and strengthen the competitiveness of businesses located in their towns and regions.”); see also, e.g., George S. Ford & Thomas M. Koutsky, *Broadband and Economic Development: A Municipal Case Study from Florida*, 17 REV. URB. & REGIONAL DEV. STUD. 216, 216 (2006) (“Our econometric model shows that Lake County . . . has experienced significantly greater growth in economic activity relative to comparable Florida counties since making its municipal fiber-optic network generally available to businesses and municipal in the county. Our findings are consistent with other analyses that postulate that broadband infrastructure can be a significant contributor to economic growth.”).

⁸² EXEC. OFFICE OF THE PRESIDENT, *supra* note 16, at 13.

⁸³ See City of Wilson, 30 FCC Rcd. 2408, 2519 (2015) (O’Reilly, Comm’r, dissenting) (“Let me start by expressing my profound opposition to the offering of broadband or any communications service by a government entity, in this case a municipality.”).

a radical political stance, even relative to the public opinions of public broadband's most ardent opponents in Washington, D.C.

Unlike Commissioner O'Rielly, lawmakers and lobbyists who consistently fight community broadband projects almost never express *per se* opposition to community-owned networks.⁸⁴ Even AT&T CEO Randall Stephenson, whose company has expended resources lobbying against public broadband networks across the country,⁸⁵ testified before Congress that he believed that public broadband networks can be a logical solution to bring connectivity to areas where broadband is unserved.⁸⁶

Commissioner O'Rielly's position matters because he sits in the majority on the Republican-led FCC. FCC commissioners cast crucial votes on telecommunications regulations, including those that effectively permit or prohibit the construction of some public broadband networks. His opposition is a major hurdle for public broadband advocates to overcome. For example, Commissioner O'Rielly voted to reject Chattanooga's request for FCC preemption from Tennessee's restrictions on municipal broadband, and explained his view as follows:

Let me start by expressing my profound opposition to the offering of broadband or any communications service by a government entity, in this case a municipality [T]he bedrock of American capitalism is private enterprise free from government manipulation as a market entrant. If there is market need, an individual with a dream and a propensity for risk will enter

⁸⁴ See, e.g., Sam Gustin, *Meet Marsha Blackburn, Big Telecom's Best Friend in Congress*, MOTHERBOARD (July 6, 2014, 7:35 PM), http://motherboard.vice.com/en_us/article/meet-marsha-blackburn-big-telecoms-best-friend-in-congress [http://perma.cc/4GBP-337X?type=image].

⁸⁵ See, e.g., Sean Buckley, *Comcast, AT&T Thwart Municipal Broadband Expansion Effort in Tennessee*, FIERCETELECOM (Mar. 16, 2016, 12:19 PM), <http://www.fiercetelecom.com/telecom/comcast-at-t-thwart-municipal-broadband-expansion-effort-tennessee> [http://perma.cc/CHA9-RRBG]; see also Michael Hiltzik, *Cable and Telecom Firms Score a Huge Win in Their War To Kill Municipal Broadband*, L.A. TIMES (Aug. 12, 2016, 2:05 PM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-cable-municipal-broadband-20160812-snap-story.html> [http://perma.cc/B37R-DBWZ].

⁸⁶ See Allan Holmes, *How Big Telecom Smothers City-Run Broadband*, CTR. FOR PUB. INTEGRITY (Aug. 28, 2014, 5:00 AM), <http://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband> [http://perma.cc/WDP9-9QZE] ("Most of the telecommunications companies say they support municipal broadband, but only for those areas that they don't serve. 'The idea of private capital competing with taxpayer-provided capital just feels inconsistent to us with what a free-market system looks like,' AT&T Chief Executive Officer Randall Stephenson said at a U.S. Senate hearing in June. 'But where it's unserved, it seems like a logical place for government to step in and provide a solution.'").

to provide service. It is not the government's role to offer services instead of or in competition with private actors.⁸⁷

As Commissioner O'Rielly explains, his belief is that if there is a market need, an individual will provide service. This statement might make sense, but only as a general approach: if a competitive market provides adequate broadband service at affordable rates, there may be little reason for a government to provide it instead or to compete with private actors.⁸⁸ But that instance does not justify opposition to government entities offering broadband in all cases, including in communities where no private actor offers broadband at all.⁸⁹ Just as it was not always cost-efficient to provide every community with electricity, it may not always be cost-efficient to provide every community with broadband. In other words, "the need for broadband is everywhere, even if the business case is not."⁹⁰ No other FCC Commissioner joined Commissioner O'Rielly's categorical opposition to public broadband.

This is not to say that there are no arguments against public broadband to be made in some cases, particularly in areas already well served by affordable broadband service. For example, some argue against public broadband networks on the grounds that these networks may have several unfair, market-distorting advantages over private ISPs, such as the ability to

⁸⁷ *City of Wilson*, 30 FCC Rcd. at 2519 (O'Reilly, Comm'r, dissenting) (emphasis added).

⁸⁸ Note the disclaimer "as a general approach." There is evidence that municipalities who announce plans to or interest in building a municipal broadband network may spur existing providers to upgrade networks and offer faster speeds. See, e.g., Comments of the Fiber to the Home Council Americas in Support of Electric Power Board and City of Wilson Petitions at 8-9, *City of Wilson*, 30 FCC Rcd. 2408 (2015) (Nos. 14-115, 14-116) ("[M]unicipal utility all-fiber systems have spurred competition and additional network builds.").

⁸⁹ This opposition can also read like a catch-22, since the municipalities most likely to look into municipal broadband provision are likely communities poorly served by their existing market for broadband, if such a market exists at all. Thus, opposition to municipal broadband in all communities on the grounds that it would compete with existing private providers opposes municipal broadband in the very communities most likely to benefit from it. See Carl Kandutsch, *The Case for Municipal Broadband*, BROADBAND PROPERTIES MAG., May 2005, at 18, 23, http://www.broadbandproperties.com/2005issues/may05issues/Carl_Kandutsch_h_The_Case_for_Muni_Broadband.pdf [<http://perma.cc/P3L3-UXYF>] ("[T]o take this objection seriously, one must ignore the evidence of market failure, which as discussed above constitutes the single greatest incentive for municipal involvement in communications in the first place. That is, if there were a healthy competitive market for communications services either nationally or locally, municipalities would not be motivated to involve themselves in the market.").

⁹⁰ *City of Wilson*, 30 FCC Rcd. at 2410.

grant themselves right-of-way or to clear regulatory barriers that might be placed in the way of private providers.⁹¹ Others argue that the public might fund networks at predatorily low rates that undercut private sector competition.⁹² Expenditures could divert money away from more pressing needs. Perhaps some governments are ill-equipped to build and manage telecommunications networks relative to private sector expertise, or the capital required for certain networks' construction makes them a bad investment if enough city residents do not ultimately adopt broadband service,⁹³ and so on. None of these arguments against public broadband are inherently wrong: any community considering deploying a broadband network should understand these concerns, as well as whether and how they apply to the community's own circumstances.⁹⁴

In any event, valid arguments against public broadband in particular cases do not support the proposition that a network would be a poor choice for all communities in all cases. Such categorical opposition to public broadband seems divorced from market reality and a rich history of public provision of essential services, including Internet services.⁹⁵ Given the existence of market failure in provision of broadband services in some communities,⁹⁶ the potential for public broadband networks to

⁹¹ See, e.g., Berin Szoka, *Don't Blame Big Cable. It's Local Governments That Choke Broadband Competition*, WIRED (July 16, 2013), <http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition> [<http://perma.cc/7L6C-FK5D>].

⁹² The opposite problem is also true: ISPs competing with municipal broadband networks have been accused of engaging in predatory pricing, dropping their prices below cost to deter subscribers from switching over to the publicly-owned network. This is especially problematic for networks like Chattanooga's, because Tennessee prohibits any government-owned network from offering service below cost, even to low- or fixed-income residents. As a result, Chattanooga offers its lowest-tier service for \$27 per month; Comcast responded by introducing a cheaper service (at one-tenth the speed) for a cheaper rate of \$19.99 per month. See Jason Koebler, *The City That Was Saved by the Internet*, MOTHERBOARD (Apr. 11, 2017, 9:30 AM), http://motherboard.vice.com/en_us/article/chattanooga-gigabit-fiber-network [<http://perma.cc/YM46-5YR3>].

⁹³ See KRUGER & GILROY, *supra* note 28, at 4.

⁹⁴ See, e.g., *Successes and Failures*, COMMUNITY NETWORKS, <http://muninetworks.org/content/successes-and-failures> [<http://perma.cc/5XTG-HSX5>] ("[O]ur position is not that every community has built a flawless network or that every community should immediately invest in fiber-to-the-home. Rather, we recognize that what is right for one community may not be right for another. Ultimately, the community itself must decide what is important and how to proceed. . . . All community broadband networks are clearly not failures. The claim is absurd.").

⁹⁵ See Eric Null, *Municipal Broadband: History's Guide*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 21, 25 (2013) ("[E]mpirical data show that municipalities can be very successful Internet providers.").

⁹⁶ See generally *supra* Introduction & Part I.

meet public needs, and the wide and varied models of public broadband networks available from which to choose, at least some communities without high-speed, affordable broadband should consider building their own networks.

2. Which Places Could Be Well-Served by Public Broadband

Whether a particular community should provide broadband, and in what form, will require a careful and fact-specific examination of a number of different factors. Here are just a few examples of what a community should consider: its existing broadband market prices, services and state of competition; potential for private investment absent any public provision; the community's goals, including its desire to close digital divides; the feasibility of other means to spur broadband provision and adoption such as subsidies or vouchers; the community's access to capital and future economic growth projections; comparisons to other municipal broadband attempts; and so on.⁹⁷

So far, communities that have built their own municipal broadband networks are mostly small to mid-sized cities, often in rural areas.⁹⁸ Intuitively, this should make sense: the "rural build-out problem" makes it harder for private providers to quickly recoup investment in less densely populated areas, so rural areas are more likely to experience market failure, represented by lack of broadband service.⁹⁹ Rural communities may be best suited to eschew a failing private market and vote in favor of a public broadband network.¹⁰⁰ Chattanooga is still the largest city served by a municipal broadband network, serving just over 170,000 households.¹⁰¹

⁹⁷ For an example of a municipal broadband feasibility study, see Seattle's study, which provides an example of the incredible range of factors a large municipality might consider before adopting a municipal broadband proposal. Columbia Telecomm. Corp., *City of Seattle Fiber-to-the-Premises Feasibility Study*, CITY OF SEATTLE (June 2015), <http://www.seattle.gov/Documents/Departments/Broadband/2016-6SeattleReport-Final.pdf> [<http://perma.cc/J3MQ-D976>].

⁹⁸ For purposes of clarity, this paper limits the term "municipal broadband" to networks that serve homes, and does not include, for example, the many communities that have built public networks to provide broadband to schools, hospitals, government buildings, and so on while leaving the provision of last-mile Internet connection to homes entirely to the private sector.

⁹⁹ See Null, *supra* note 95, at 23-24.

¹⁰⁰ Notably, three in four cities that have built high-speed broadband networks tend to vote for Republican candidates in national elections. See Chris Mitchell, *Most Municipal Networks Built in Conservative Cities*, COMMUNITY NETWORKS (Jan. 20, 2015), <http://muninetworks.org/content/most-municipal-networks-built-conservative-cities> [<http://perma.cc/EU8N-VHJ5>].

¹⁰¹ Emily Badger, *Why Are There No Big Cities with Municipal Broadband Networks?*, CITYLAB (Mar. 4, 2013),

Larger urban communities should also consider building public broadband networks, though they may have different obstacles and considerations. First, the increased number of households served by a large urban network means the construction cost may be greater (though perhaps not on a per-subscriber basis, and their revenue base may be greater too). Second, because most urban residents have access (if not affordable access) to at least one broadband provider, incumbents will likely lobby against the network's construction. In the past, incumbent providers have proved formidable foes of public broadband networks, successfully lobbying a great number of state and local governments to write laws that "stifle municipal broadband in its infancy."¹⁰²

Another factor complicating the construction of municipal broadband in larger cities is that the most pressing broadband problem in many of these areas is not lack of deployment but rather lack of adoption, driven by unaffordable pricing. In these areas, residents may support a municipal broadband network not because the private market failed to provide broadband, but because the private market failed to provide broadband at a price enough people can afford.¹⁰³

B. Public Broadband in Urban Areas

Like rural areas, urban areas should look to the wide range of forms of public broadband networks and determine if any would fit the municipality's particular goals. For example, instead of becoming a publicly owned ISP like EPB in Chattanooga, some urban areas could consider fostering a market for competitive, high-speed networks by financing the construction of high-speed last-mile connections and then leasing those connections to competing ISPs.

As discussed *supra*, one way to analogize this type of network is to compare it to an airport, where a city finances the airport's construction and private airline companies pay the city to lease space in terminals and gates.¹⁰⁴ Here, the city would finance and own the last-mile network (the airport), and

<http://www.citylab.com/cityfixer/2013/03/why-are-there-no-big-cities-municipal-broadband-networks/4857> [http://perma.cc/8492-SDPW].

¹⁰² John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 107 (2009).

¹⁰³ Here, low-income consumers lack "access" to broadband in the same way they may, in many states, lack "access" to health insurance: though the product (health insurance or broadband) is offered on the market, its monthly cost means the consumer cannot afford to purchase it. Absent subsidies or price regulations, from the consumer's perspective the accessibility of an unaffordable product is not meaningfully different from if the product were not offered at all.

¹⁰⁴ See text accompanying *supra* note 27.

lease the use of those connections to private ISPs (airlines). Susan Crawford, who has written and published extensively on telecommunications networks, advocates a similar approach:

The only business model for fiber that will work to produce the competition, low prices, and world-class data transport we need—certainly in urban areas—is to get local governments involved in overseeing basic, street grid-like “dark” (passive, unlit with electronics) fiber available at a set, wholesale price to a zillion retail providers of access and services . . . a wholesale facility that any retail actor can use at a reasonable, fair cost.

The result: Instead of different wires competing side by side with one another, there would be one great basic facility available neutrally to every form of business. Your ISP could use that fiber in competition with 10 others; your traffic lights could use it to govern congestion; your energy grid could use it to measure and regulate consumption and use of renewables At the same time, the government would stay out of providing and inventing retail services itself.¹⁰⁵

In addition, public investment in high-speed broadband can help advance equity-based goals, which governments are often better equipped to work toward than are revenue-maximizing private firms.¹⁰⁶ For example, the public broadband network in Wilson, North Carolina, offers public housing residents fifty-megabits-per-second connections for just ten dollars a month.¹⁰⁷ For this reason, public broadband advocates in urban areas may emphasize the network’s potential to advance equity, alongside arguments that the network would offer better speed, service, and prices.

In Seattle, a group of citizens named Upgrade Seattle is “dedicated to creating a publicly-owned Municipal Broadband utility focused on equity.”¹⁰⁸ Their advocacy materials suggest

¹⁰⁵ Crawford, *supra* note 27 (emphasis added).

¹⁰⁶ *Episode 23: Susan Crawford on Investing in Internet Infrastructure*, ADAM RUINS EVERYTHING (Mar. 29, 2017), <http://www.maximumfun.org/adam-ruins-everything/adam-ruins-everything-episode-23-susan-crawford-investing-internet-infrastruct> [<http://perma.cc/GR4R-9ZG7>].

¹⁰⁷ Elizabeth Woyke, *How To Keep the Government from Breaking the Internet*, MIT TECH. REV. (Apr. 13, 2017), <http://www.technologyreview.com/s/604054/how-to-keep-the-government-from-breaking-the-internet> [<http://perma.cc/Z47T-HHD7>].

¹⁰⁸ *Why Municipal Broadband?*, UPGRADE SEATTLE,

an approach that arguments for public broadband in urban areas might take:

Seattle is Ready for Better Broadband

It's time to make the Internet a city-owned and operated utility, just like water and electricity.

Whether you're living in Beacon Hill, Rainier Valley, Capitol Hill or Northgate, you deserve equitable access to fast and affordable Internet. Did you know that 15% of Seattle residents lack home internet?

We can roll out affordable gigabit broadband to everyone in Seattle by making it a public utility

Other cities have already created their own municipal broadband networks, like Chattanooga, Tennessee. It is time for the City of Seattle to do the same.¹⁰⁹

In 2015, Seattle's city council voted 6-2 against funding a \$5 million municipal broadband pilot project, but Upgrade Seattle remains committed to its mission.¹¹⁰ That same week, Seattle's residents voted to approve an additional \$930 million property tax to fund city transportation services.¹¹¹ It is at least conceivable that Seattle residents could one day vote to fund a municipal broadband network costing half or two-thirds that price.¹¹²

If larger urban areas like Seattle build successful municipal broadband networks, then just as "in the age of electrification, the question of municipalization may grow from a small-town referendum to a national debate."¹¹³ Still, most municipalities

<http://www.upgradeseattle.com/what-we-do> [<http://perma.cc/JHU4-PTUG>].

¹⁰⁹ UPGRADE SEATTLE, <http://www.upgradeseattle.com> [<http://perma.cc/ENX9-83RS>].

¹¹⁰ See Josh Cohen, "No" Vote Isn't Stopping Push for Municipal Broadband in Seattle, NEXTCITY (Nov. 23, 2015), <http://nextcity.org/daily/entry/no-vote-isnt-stopping-push-for-municipal-broadband-in-seattle> [<http://perma.cc/WW6R-Y8TR>].

¹¹¹ *Levy to Move Seattle*, SEATTLE DEP'T TRANSP., <http://www.seattle.gov/transportation/levytomoveseattle.htm> [<http://perma.cc/X4G4-3AVF>].

¹¹² See Cohen, *supra* note 110 ("Cost was another potential barrier that [Seattle Chief Technology Officer Michael] Mattmiller pointed to in his rationale for not taking on municipal broadband. The city's study found implementation would cost between \$463 and \$630 million, lower than previous feasibility studies had found, but still expensive. Nonetheless, Seattle voters have shown a willingness to tax themselves to fund city investments and recently passed a record \$930 million transportation levy.").

¹¹³ Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTERS & TECH. L.J.

hoping to build these networks will encounter legal and political hurdles on the way. One of the most pressing hurdles may be the lack of political support, and perhaps outright opposition, from the Republican-led majority at the FCC.

C. Will President Trump's FCC Support Public Broadband?

Before the election of President Donald Trump, the Democrat-led FCC majority under President Barack Obama had planted itself firmly in favor of allowing communities to construct municipal broadband networks.¹¹⁴ The FCC's support of municipal broadband played a critical part in the efforts to expand the municipal broadband networks in Chattanooga and Wilson. Those municipalities relied on the FCC's permission to preempt restrictive state laws. It is not yet clear whether the FCC will continue its Obama-era support of municipal broadband networks.

If Chairman Ajit Pai shifts the FCC's position on public broadband, the decision would disproportionately impact Americans living in rural areas, who stand to gain the most from increased access to affordable high-speed broadband.¹¹⁵ As outgoing FCC Chairman Tom Wheeler argued, this change would be especially unfortunate, since these were the same areas that by and large voted for President Trump.¹¹⁶

In his first remarks as FCC Chairman, Pai described bridging digital divides as one of his "top priorities," but expressed support only for private providers' efforts, making no reference to the role of the public sector.¹¹⁷ Chairman Pai's

1, 43 (1999).

¹¹⁴ See, e.g., Tom Wheeler, FCC Chairman, *Removing Barriers to Competitive Community Broadband*, FCC BLOG (June 10, 2014, 4:17 PM), <http://www.fcc.gov/news-events/blog/2014/06/10/removing-barriers-competitive-community-broadband> [<http://perma.cc/9EXP-2J5A>].

¹¹⁵ Jon Brodtkin, *Trump Voters Need Fast Broadband and Net Neutrality Too, Tom Wheeler Says*, ARS TECHNICA (Jan. 20, 2017), <http://arstechnica.com/tech-policy/2017/01/trump-voters-need-fast-broadband-and-net-neutrality-too-tom-wheeler-says/> [<http://perma.cc/59VM-E4ND>] ("[T]wo-thirds of consumers in America have one or fewer broadband choices Where are those choices most limited? In the areas where Donald Trump got the strongest response, in rural areas, outside of major cities. If indeed this is an administration that is speaking for those that feel disenfranchised, that representation has to start with saying, 'we need to make sure you have fast, fair, and open Internet because otherwise you will not be able to connect to the 21st century.'").

¹¹⁶ See *id.*; see also Danielle Kurtzleben, *Rural Voters Played a Big Part in Helping Trump Defeat Clinton*, NPR (Nov. 14, 2016), <http://www.npr.org/2016/11/14/501737150/rural-voters-played-a-big-part-in-helping-trump-defeat-clinton> [<http://perma.cc/A8SG-FG6W>].

¹¹⁷ See Remarks of Ajit Pai, Chairman, Fed. Comm'ns Comm'n (Jan. 24, 2017), http://apps.fcc.gov/edocs_public/attachmatch/DOC-343184A1.pdf

broadband deployment working group came under fire after the mayor of San Jose, California publicly resigned from it, stating in an open letter that it was apparent that the group's goal was "to create a set of rules that will provide industry with easy access to publicly-funded infrastructure at taxpayer-subsidized rates, without any obligation to provide broadband access to underserved residents."¹¹⁸ The group's draft model code for states explicitly discouraged city-owned networks, though it did not rule them out completely.¹¹⁹

It is not yet clear where Chairman Pai stands on the issue of public broadband. Despite Chairman Pai's stated interest in bridging digital divides, the number of successful public broadband networks, and FCC support for municipal broadband in the last administration, Chairman Pai's "Digital Empowerment Agenda" did not mention public broadband.¹²⁰ Although Commissioner O'Rielly's categorical opposition to public broadband is extreme, at least it is expressed. It would be helpful for public broadband advocates and opponents alike to know where Chairman Pai stands.

Whether or not Chairman Pai does decide to publicly support public broadband during his tenure, communities should be taking a close look at whether a public broadband network would fit their needs. Building the network, however, may require overcoming several legal hurdles.

III. OVERCOMING LEGAL BARRIERS TO PUBLIC BROADBAND

"That's not capitalism That's crony capitalism."

—Tennessee State Representative
Mike Carter (R-Hamilton
County)¹²¹

[<http://perma.cc/W3DB-W8Q3>] ("One of the most significant things I've seen during my time here is that there is a digital divide in this country—between those who can use cutting-edge communications services and those who do not. I believe one of our core priorities going forward should be to close that divide—to do what's necessary to help the private sector build networks, send signals, and distribute information to American consumers We must work to bring the benefits of the digital age to all Americans.")

¹¹⁸ Jon Brodtkin, *Mayor Quits FCC Committee, Says It Favors ISPs over the Public Interest*, ARS TECHNICA (Jan. 25, 2018), <http://arstechnica.com/tech-policy/2018/01/fcc-broadband-committee-wants-to-restrict-publicly-owned-networks/> [<http://perma.cc/97U2-NFBB>].

¹¹⁹ *Id.*

¹²⁰ Ajit Pai, Comm'r, Fed. Comm'n's Comm'n, A Digital Empowerment Agenda (Sept. 13, 2016), http://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf [<http://perma.cc/W9XZ-GB27>].

¹²¹ Mariam Baksh, *Municipalities Dream Big on Broadband*, AM. PROSPECT (Aug. 19, 2016), <http://prospect.org/article/municipalities-dream-big-broadband> [<http://perma.cc/WW8N-L8NM>].

Nebraska is the only state in the country where every single resident and business receives electricity from a community-owned institution,¹²² and electricity in Nebraska costs fifteen percent less than the national average.¹²³ Despite Nebraska's success with the public provision of electricity, the state takes the opposite approach when it comes to broadband: state law categorically bans local communities and public power companies from providing broadband service.¹²⁴

Nebraska's ban is perhaps the strictest in the country, but at least nineteen other states ban or restrict the construction or provision of public broadband.¹²⁵ Thus, in addition to navigating local laws and transactions governing pole sharing or right-of-way restrictions,¹²⁶ communities hoping to build

¹²² Thomas M. Hanna, *Community-Owned Energy: How Nebraska Became the Only State to Bring Everyone Power from a Public Grid*, YES! MAG. (Jan. 30, 2015), <http://www.yesmagazine.org/commonomics/nebraskas-community-owned-energy> [<http://perma.cc/F6C9-G2HG>] ("In the United States, there is one state, and only one state, where every single resident and business receives electricity from a community-owned institution rather than a for-profit corporation Nebraskans pay one of the lowest rates for electricity in the nation and revenues are reinvested in infrastructure to ensure reliable and cheap service for years to come.").

¹²³ Neb. Energy Office, *Annual Average Electricity Price Comparison by State*, STATE OF NEB., <http://www.neo.ne.gov/statshtml/204.htm> [<http://perma.cc/B7AJ-JSKX>] ("As of 2016, the statewide average electricity price is the seventeenth-lowest rate in the country, based on the latest federal figures. Nationally, electricity costs 13 percent more than it does in Nebraska.").

¹²⁴ NEB. REV. STAT. ANN. §§ 86-594 ("Agency or political subdivision of state; limitation on power: . . . an agency or political subdivision of the state that is not a public power supplier shall not provide on a retail or wholesale basis any broadband services, Internet services, telecommunications services, or video services"), -595 ("Public power supplier, limitation on retail services: (1) A public power supplier shall not provide on a retail basis any broadband services, Internet services, telecommunications services, or video services"); *see also id.* §§ 86-575, -593.

¹²⁵ *See* Jason Koebler, *The 21 Laws States Use to Crush Broadband Competition*, MOTHERBOARD (Jan. 14, 2015, 6:16 PM), http://motherboard.vice.com/en_us/article/the-21-laws-states-use-to-crush-broadband-competition [<http://perma.cc/9L5T-BYH6>] (listing Nebraska under "Total Ban," the strictest category, along with five other states: Arkansas, Missouri, Montana, Tennessee, and Virginia); *see also id.* ("There are three different 'categories' of state law banning municipal broadband. There are 'If-Then' laws, which have some requirements for municipal networks such as a voter referendum or a requirement to give telecom companies the option to build the network themselves, rather than restrictions (some are easier to meet than others). Then there are 'Minefield' laws, which are written confusingly so as to invite lawsuits from incumbent ISPs, financial burden on a city starting a network, or other various restrictions. Finally, you've got the outright bans. Some of these are simple, others are worded in a way that make it seem like it'd be possible to jump through the hoops necessary to start a network, but in practice, it's essentially impossible.").

¹²⁶ Getting access to utility poles is a major barrier to entry for new ISPs, including municipal broadband networks, as it often requires negotiating agreements with a number of different companies, sometimes including

public broadband networks in these states will find their efforts stymied by state-level restrictions. That is, unless those communities can effect changes in their states' laws or successfully petition the FCC to preempt them.¹²⁷ Neither approach is a sure bet.

A. State-Based Restrictions on Public Broadband

Before allowing a city to build a broadband network, a state may have an interest in ensuring that its cities conduct proper feasibility studies, finance responsibly, fairly compete against any private providers, and so on.¹²⁸ But categorically banning public provision of broadband as a matter of principle is difficult to justify, as well as politically unpopular.¹²⁹

One explanation for why some state legislatures enact heavy restrictions on community broadband is that private ISPs pressure them to. Private ISPs have a well-documented history of lobbying for these restrictions and financially supporting state legislators who enact them.¹³⁰

incumbent ISPs with little incentive to facilitate potential competitors' market entry. *See, e.g.*, Susan Crawford, *Blame Your Lousy Internet on Poles*, BACKCHANNEL (Aug. 31, 2016), <http://backchannel.com/blame-your-lousy-internet-on-poles-1998a85c3ed9> [<http://perma.cc/5YQ4-DV62>].

¹²⁷ *See* Comments of the Coalition for Local Internet Choice at 21, City of Wilson, 30 FCC Rcd. 2408 (2015) (Nos. 14-115, 14-116) ("While the barriers differ from state to state, they all have a single purpose and effect—to block or significantly delay public entities in deploying advanced communications networks . . . Unless and until these barriers are removed by federal or state action, countless communities in the states in question will be deprived of the advantages that communities in other states enjoy."). *But see* Michael O'Rielly, *Municipal Broadband: A Snapshot*, FCC BLOG (Jan. 30, 2015, 3:32 PM), <http://www.fcc.gov/news-events/blog/2015/01/30/municipal-broadband-snapshot> [<http://perma.cc/T46C-7P9Y>] ("[M]any of the limitations or restrictions appear to be justified practices by state governments and should be excluded from any preemption discussion.").

¹²⁸ *See, e.g.*, Sylvain, *supra* note 47, at 815 ("Surely, states are imposing restrictions in response to the vigorous lobbying of private carriers. But there are earnest policy reasons for them as well. Any governmental meddling, critics contend, will distort the efficient operation of the price mechanism. Municipally supported service, they explain, has an unfair competitive advantage over private provider service because, among other things, the former can pass along costs to taxpayers without paying taxes or attending to the same market pressures.").

¹²⁹ Brian Fung, *Most Americans Want To Let Cities Build and Sell Homegrown Internet Service*, SWITCH (Apr. 11, 2017), <http://www.washingtonpost.com/news/the-switch/wp/2017/04/11/most-americans-want-to-let-cities-build-and-sell-homegrown-internet-service> [<http://perma.cc/3LZ2-P5PX>].

¹³⁰ One could write an entire article about these lobbying efforts alone. Nonetheless, given the preponderance of states that have passed restrictions on municipal broadband, citing to a reference in each instance would be onerous and unnecessary. *See generally* Holmes, *supra* note 86 ("For more

For example, from 2003 to 2004 alone, private ISPs spent over five million dollars in lobbying fees in a successful attempt to convince the state of Pennsylvania to adopt a de facto state prohibition against new municipal broadband projects.¹³¹ Similar efforts abound in states that have enacted prohibitions or restrictions on public broadband. So long as incumbent private ISPs are powerful special interests in state legislatures, communities may find it difficult or unrealistic to expect to convince their state legislatures to modify or overturn these restrictions on community broadband.¹³² They may find better success appealing to Congress, but that is no sure bet, either.

than a decade, AT&T, Comcast, Time Warner Cable Inc., and CenturyLink Inc. have spent millions of dollars to lobby state legislatures, influence state elections and buy research to try to stop the spread of public Internet services that often offer faster speeds at cheaper rates. The companies have succeeded in getting laws passed in 20 states that ban or restrict municipalities from offering Internet to residents.”).

¹³¹ See, e.g., Associated Press, *Lobbyists Try to Kill Philly Wireless Plan: State Law Pushed by Industry Would Block City Program*, NBC (Nov. 23, 2004), http://www.nbcnews.com/id/6570011/ns/technology_and_science-wireless/t/lobbyists-try-kill-philly-wireless-plan/ [http://perma.cc/6LAA-R6TT] (“Philadelphia’s plan to offer inexpensive wireless Internet as a municipal service—the most ambitious yet by a major U.S. city—has collided with commercial interests including the local phone company, Verizon Communications, Inc. In fact, a bill on Gov. Ed Rendell’s desk that could humble Philadelphia’s ambitions began 19 months ago as a proposal drafted by lobbyists for telecommunications companies.”); see also O’Loughlin, *supra* note 5, at 491 (“While the public relations battle raged, Verizon and other interested parties significantly ramped up lobbying efforts in Pennsylvania, paying out \$5,275,671 to registered lobbyists between 2003 and 2004, with Verizon alone contributing \$3,152,863. In the years preceding, Verizon had taken pains to court the state’s officials, spending almost half a million dollars in the previous three election cycles. As a result of its efforts, and with the help of Pennsylvania Governor Ed Rendell’s former campaign manager, Verizon and the state’s other local phone providers convinced state lawmakers to pass a bill that gives the incumbent carriers the power to effectively veto telecommunications projects by municipal governments.”).

¹³² Tennessee State Senator Todd Gardenhire (R-Chattanooga) describes AT&T as “the most powerful lobbying organization in this state by far,” and blames the company for killing attempts to further municipal broadband efforts in the state. See Andy Sher, *‘AT&T Is the Villain’ in Battle over Rural Broadband Access, Gardenhire Says*, TIMES FREE PRESS (Feb. 3, 2016), <http://www.timesfreepress.com/news/local/story/2016/feb/03/tennessee-supporters-rural-broadband-rally-state-capitol-demand-legislative-action/348317>; [http://perma.cc/5DPY-NK9F]; see also *id.* (“The bill has been opposed for years by AT&T, Comcast and other providers who say it’s unfair for them to have to compete with government entities like EPB. But EPB, as well as some lawmakers like Gardenhire, say if the free market isn’t providing the service, someone else should. ‘Don’t fall for the argument that this is a free market versus government battle,’ Gardenhire said. ‘It is not. AT&T is the villain here, and so are the other people and cable.’”).

B. Congress and the Community Broadband Act

In 2005, the year after Pennsylvania enacted its restriction on public broadband networks, a bipartisan group of senators introduced the Community Broadband Act, which would “block states from restricting local governments’ ability to provide” broadband service. The six senators supporting the bill hailed from both parties and from all over the country—Democrats Frank Lautenberg (N.J.), John Kerry (Mass.), and Russ Feingold (Wis.), as well as Republicans John McCain (Ariz.), Lindsey Graham (S.C.), and Norm Coleman (Minn.); they were later joined by Republicans Ted Stevens (Alaska), Olympia Snowe (Me.), and Gordon Smith (Or.).

When Senator McCain introduced this bill on the Senate floor, he said, “When private industry does not answer the call because of market failures or other obstacles, it is appropriate and even commendable, for the people acting through their local governments to improve their lives by investing in their own future.”¹³³ The next year, the House of Representatives passed a larger, bipartisan bill that incorporated the Community Broadband Act—but the Senate never passed its version into law.¹³⁴

Over ten years later, Congress still has not passed the Community Broadband Act. Despite bipartisan support among the voting public, support for public broadband among national lawmakers now appears to divide national representatives along party lines, with Democrats generally in favor and Republicans opposed.¹³⁵ In 2015, Senator Cory Booker reintroduced the Community Broadband Act, with five cosponsors (four Democrats and one Independent);¹³⁶ Representative Anna Eshoo’s version in the House of Representatives had just two cosponsors, both Democrats.¹³⁷ As

¹³³ Brendan Sasso, *How Republicans Flip-Flopped on Government-Run Internet*, ATLANTIC (Aug. 26, 2014), <http://www.theatlantic.com/politics/archive/2014/08/how-republicans-flip-flopped-on-government-run-internet/456861> [http://perma.cc/2YEA-7SEE].

¹³⁴ See *id.* (“In 2006, their bill was a few short steps away from becoming law, as it was included as a provision in a broader overhaul of telecommunications regulation. That larger bill, authored by Republican Rep. Joe Barton, then chairman of Energy and Commerce, passed the House with 321 votes—including 215 Republicans. Only eight Republicans voted against it. But fights over net neutrality and other issues bogged the legislation down in the Senate, and it never became law.”).

¹³⁵ See *id.*

¹³⁶ *Cosponsors: S.240—Community Broadband Act of 2015*, CONGRESS.GOV, <http://www.congress.gov/bill/114th-congress/senate-bill/240/cosponsors> [http://perma.cc/96Z8-ZXJ9].

¹³⁷ *Cosponsors: H.R. 6013—Community Broadband Act of 2016*, CONGRESS.GOV, <http://www.congress.gov/bill/114th-congress/house-bill/6013/cosponsors> [http://perma.cc/8JYP-AZXT].

FCC Commissioner Mignon Clyburn observed: “What is striking, is that the language in all of these bills is nearly identical [to those proposed in earlier years]. The only thing that has changed is the lack of bipartisan support.”¹³⁸ The same partisan split is not equally mirrored at local levels.¹³⁹ A recent study found that three out of four cities with municipal broadband networks tend to vote for Republican candidates in national elections.¹⁴⁰

It is not clear whether any one reason explains why this nonpartisan issue now divides representatives on the national level, despite widespread support from voters both parties.¹⁴¹ Barring a “wave” election bringing in a sufficient number of national representatives willing to buck heavy lobbying opposition from private ISPs, the prospect of an imminent legislative solution in the form of a revived bipartisan Community Broadband Act appears distant.

However, it is also possible that Congress *already* passed legislation that would give the FCC authority to preempt state laws restricting public broadband and would allow communities to appeal directly to the FCC for the right to lay their own networks. If true, then Congress may not need to revive the Community Broadband Act at all, since the FCC would already have the power it needs to preempt these restrictive state laws. The source of the FCC’s would-be preemption powers are two provisions written into the

¹³⁸ See City of Wilson, 30 FCC Rcd. 2408, 2504 (2015).

¹³⁹ For example, in 2017, a bipartisan group of Virginia state representatives mounted an unsuccessful public campaign to defeat a bill that would restrict municipal broadband statewide. See Lisa Gonzalez, *Despite Intense Bipartisan Opposition, Virginia’s Anti-Municipal Broadband HB 2108 Passes*, INST. FOR LOC. SELF-RELIANCE (Feb. 8, 2017), <http://ilsr.org/despite-intense-bipartisan-opposition-virginias-anti-municipal-broadband-hb-2108-passes> [<http://perma.cc/329D-FQHS>] (“At a time when everything seems political, both Republicans and Democrats appreciate that this is not a political issue. The bill’s new language, terrible as it is, passed through the House Labor and Commerce Committee on February 2. The vote in the committee was close—11 supported the bill and 9 opposed it. Six Republicans opposed the bill while two Democrats supported it. Likewise, when the bill passed in the House yesterday, Delegates voting against passage were 13 Republicans and 11 Democrats.”).

¹⁴⁰ See Christopher Mitchell, *Most Municipal Networks Built in Conservative Cities*, COMMUNITY NETWORKS (Jan. 20, 2015), <http://muninetworks.org/content/most-municipal-networks-built-conservative-cities> [<http://perma.cc/AX9P-2C6C>].

¹⁴¹ One explanation ties national Republicans’ “flip-flop” on municipal broadband to partisan animosity between Congress and the President, who publicly advocated for municipal broadband. See Sasso, *supra* note 133 (“But it’s hard to ignore the most significant change since the Republicans sponsored the municipal broadband bills a few years ago: The Obama administration has taken a position on the issue [I]nstantly ma[king] the issue more partisan. Wheeler’s push on the issue has polarized Republicans, but it’s also rallied Democrats to his side.”).

Telecommunications Act of 1996.

C. FCC Regulatory Authority

The Telecommunications Act of 1996 (“1996 Act”), the nation’s first major telecommunications regulatory overhaul in over sixty years, substantially amended the 1934 Communications Act that first created the FCC.¹⁴² In passing the 1996 Act, Congress aimed to promote competition, reduce regulation, and encourage deployment of new telecommunications technologies, including the Internet.¹⁴³ The 1996 Act made a great number of changes in telecommunications law, but above all, Congress was “eager to lift nearly all unnecessary regulatory burdens on competition and entry into the local telecommunications market.”¹⁴⁴

1. Preemption of State Laws Under Section 253

To lift those regulatory burdens, Congress empowered the FCC to preempt state and local laws that posed unnecessary barriers to market entry and competition.¹⁴⁵ Under the 1996 Act, the FCC could preempt any state laws that prohibited, on a non-neutral basis, any entity from providing interstate or

¹⁴² See *generally*, e.g., CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RL33034, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM (2005), <http://digital.library.unt.edu/ark:/67531/metacrs7798/> [<http://perma.cc/2LW2-XEGH>] (describing the changes brought about by 1996 Act).

¹⁴³ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), http://library.clerk.house.gov/reference-files/PPL_104_104_Telecommunications_1996.pdf [<http://perma.cc/66F9-4BT5>].

¹⁴⁴ Sylvain, *supra* note 47, at 825; see also ANGELE A. GILROY, CONG. RESEARCH SERV., 96-223 SPR, THE TELECOMMUNICATIONS ACT OF 1996 (P.L. 104-104): A BRIEF OVERVIEW 1, (1998), http://digital.library.unt.edu/ark:/67531/metadc818117/m2/1/high_res_d/96-223_1998Nov02.pdf [<http://perma.cc/N898-PXGN>] (“The general policy objective of the 1996 Act is to open up markets to competition by removing unnecessary regulatory barriers.”).

¹⁴⁵ See Sylvain, *supra* note 47, at 825-26 (“Through Section 253(a) in particular, legislators were keen on lifting all unnecessary state and local barriers to competition and market entry. Sponsors of the bill, for example, prevailed over a tiny minority of legislators who did not want to see state regulatory authority diminished. Overwhelming majorities in both chambers evidently had little confidence in states’ ability or will to encourage competition in the local telecommunications market. The bill to which members agreed, again, endowed the FCC with the power to preempt state and local laws that posed any unnecessary barriers to market entry, only making allowances for state laws that regulate rights-of-way, impose competitively neutral requirements on providers, protect consumers, and assure universal service. Legislators also seemed to consider local government agencies to be among the new market entrants that would be protected from unnecessary barriers.” (footnotes omitted)).

intrastate telecommunications service.¹⁴⁶ During floor debates over this provision, a minority of senators expressed concerns that the FCC might overreach with its preemption power, but ultimately the majority of senators “seemed to have even less confidence in the states to usher in the changes necessary to bring competition, and they successfully defended the power of the FCC to preempt state regulations.”¹⁴⁷ Ostensibly, this provision—section 253—meant that the FCC could preempt state laws that prohibited cities from providing municipal broadband.

But the Act went further still in empowering the FCC to free localities from burdensome state-level laws that hindered the spread of affordable Internet access, by including another wide-ranging grant of FCC authority.

2. Removing Barriers to Investment, Deployment, and Competition Under Section 706

The 1996 Act also requires the FCC to encourage the reasonable and timely deployment of “advanced telecommunications capability”¹⁴⁸ to all Americans and to report on this progress to Congress each year.¹⁴⁹ If the FCC determines these goals are not met, the 1996 Act requires the FCC to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁵⁰ Whenever a state imposes regulations that protect incumbent ISPs at the expense of adequate investment or deployment of broadband service, this provision—section 706—provides the FCC with authority to “remove” state barriers, which ostensibly includes the power to preempt state laws.¹⁵¹

¹⁴⁶ 47 U.S.C. § 253(a) (2006) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).

¹⁴⁷ Duane McLaughlin, *FCC Jurisdiction Over Local Telephone Under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2223-34 (1997). For more information about the congressional floor debate over section 253, see *id.* at 2223-36.

¹⁴⁸ “Advanced Telecommunications Capability” is defined in Section 706(c)(1) of the Act: “The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 47 U.S.C. § 1302(d)(1).

¹⁴⁹ See *generally* 47 U.S.C. § 1302 (2012) (“Advanced Telecommunications Incentives”).

¹⁵⁰ See *id.* § 1302(b).

¹⁵¹ See *City of Wilson*, 30 FCC Rcd. 2408, 2411-12 (2015) (“Section 706 does not contain an exception for state laws regarding how municipalities may provide

3. Courts Preempt FCC Preemption

For proponents of municipal broadband, both parts of the 1996 Act appear to give the FCC the power to preempt state laws restricting municipal broadband. However, when cities filed for FCC preemption of state laws restricting municipal broadband—first under section 253 and later under section 706—both attempts failed. Lower courts split, but on appeal, the highest courts that heard each case (the Supreme Court regarding section 253 in *Nixon v. Missouri Municipal League*, and the Court of Appeals for the Sixth Circuit regarding section 706 in *Tennessee v. Federal Communications Commission*) decided it was not sufficiently clear that Congress had given the FCC preemption power over state-level restrictions on provision of broadband by any political subdivision of the state, including by municipalities, municipally owned utilities, or any other public entity.¹⁵²

These two decisions left a legacy that continues to hinder efforts to offer publicly-owned broadband service. They deserve reconsideration—especially *Missouri Municipal League*, which has been widely criticized since.¹⁵³ A number of scholars published stern critiques of the *Missouri Municipal League* reasoning, stressing, for example, its “thin analysis of telecommunications law administration generally and the pertinent statutory provision in particular,”¹⁵⁴ its failure to take into account legislative history,¹⁵⁵ its “conscious disregard for the benefits of municipal broadband,”¹⁵⁶ its departure from established federalism doctrine,¹⁵⁷ and many other concerns.¹⁵⁸

interstate communications. Rather, section 706(a) broadly authorizes the Commission to use ‘regulating methods that remove barriers to broadband investment,’ of which preemption is undoubtedly one.”).

¹⁵² See *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

¹⁵³ See, e.g., *infra* notes 154-160.

¹⁵⁴ Sylvain, *supra* note 47, at 822; see also *id.* (“By failing to meaningfully consider the full scope of regulatory interventions in the regulatory field (under the amended Communications Act and elsewhere) and the language and purpose of the provisions at issue (Section 253 of the Telecommunications Act), the Court failed to consider the full sweep of resources available for determining legislative intent. For these reasons, the *Missouri Municipal League* opinion presents very little insight into the status of contemporary state restrictions on municipal broadband.”).

¹⁵⁵ See, e.g., Travis, *supra* note 43, at 1734 (“The legislative history of section 253(a) also provides no basis for reading its preemption of anticompetitive state telecommunications laws as not applying to municipal utilities.”).

¹⁵⁶ Stricker, *supra* note 4, at 607.

¹⁵⁷ See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1021 (2007) (“*Nixon*’s vision of the imperatives of state control also ignores the myriad of ways in which Congress, at times with the Court’s blessing, interferes directly with the internal structuring of state governments in a variety of contexts. *Lawrence County v. Lead-Deadwood School District No. 40-1* is a

Taking all of these critiques together, some argue that courts should hesitate before applying the *Missouri Municipal League* precedent widely.¹⁵⁹

Given the private market's failure to provide affordable high-speed broadband to all Americans since the *Missouri Municipal League* decision, and the *Tennessee v. FCC* decision that followed the *Missouri Municipal League* precedent, I return to both cases. I argue that *Missouri Municipal League* was a product of a particular political moment and a misunderstanding of the issues at stake. The ruling strayed from longstanding principles of statutory interpretation, and its legacy has been the stifling of public broadband deployment in the United States.¹⁶⁰

There is reason for hope. The public outcry for net neutrality in 2014 and again in 2017 indicates that the public may have a greater understanding of telecommunications regulation than it did a decade ago, as well as a greater appetite for democratic participation in Internet rulemaking.¹⁶¹ With enough public pressure, Congress could pass corrective legislation.

As a complementary approach, the FCC could try once more

stark example, but by no means the only one. As discussed, the Court has upheld interference with state ordering of its own political subdivisions in voting rights, the structure of state employment, and in the general scope of state power." (footnotes omitted)).

¹⁵⁸ See, e.g., Sylvain, *supra* note 47, at 818 ("The attention the *Missouri Municipal League* opinion has received from legislators and commentators is reason alone to give that opinion more than casual consideration."); *id.* at 818 n.131 ("The opinion has attracted the attention of able commentators for the past seven or so years. These commentators have not directed their analysis so much at the Court's consideration of Section 253(a), the 1996 Telecommunications Act, or communications law generally as much as the Court's unwarranted aggrandizement of state authority over resident local governments.").

¹⁵⁹ See, e.g., Matthew Dunne, Note, *Let My People Go (Online): The Power of the FCC to Preempt State Laws that Prohibit Municipal Broadband*, 107 COLUM. L. REV. 1126, 1157 (2007) ("More fundamentally, it may be wise to question some of the concerns underlying [*Missouri Municipal League*] before applying its precedent more widely."). Courts appear to have followed this tack: until the *Tennessee v. FCC* decision that rested on *Missouri Municipal League* precedent, courts distinguished or declined to extend the *Missouri Municipal League* decision.

¹⁶⁰ See, e.g., Blevins, *supra* note 102, at 109 ("The significance of *Nixon*, then, is that the Court both upheld the legality of the states' post-1996 Act restrictions on municipal entry, and opened the door for new legislative restrictions.").

¹⁶¹ See, e.g., Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands*, NPR (Sept. 17, 2014, 3:12 PM ET), <http://www.npr.org/sections/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-heres-where-net-neutrality-stands> the broadband market [<http://perma.cc/2CK7-U6H6>] ("[A] record 3.7 million comments arrived at the FCC [F]ewer than 1 percent were opposed to net neutrality enforcement.").

to grant municipalities preemption under section 253. If states were to challenge this action in court, it would give the Court a chance to revisit and overrule its 2004 *Missouri Municipal League* decision. Even if the FCC lost in court and the Supreme Court upheld its 2004 decision, the public effort—including high-profile testimony on the successes of public broadband networks and the special interest dollars that flowed to backers of state-level restrictions on public broadband—might be enough to move the needle for Congress.

The case for categorical bans on public broadband is so weak that sunlight may be enough to end them entirely, or at least to roll them back into reasonable restrictions. With enough publicity and public pressure, Congress may be persuaded to finally adopt the Community Broadband Act, thereby joining the majority of Americans in expressing their belief that local communities should have the right to build their own networks.

IV. NIXON V. MISSOURI MUNICIPAL LEAGUE: THE LOSS OF SECTION 253

“The monopolist’s tools are lawyers and local statutes; his tactics are delays and court challenges, all deployed with an eye toward unraveling firms with lesser resources.”

—Columbia Law Professor Tim Wu¹⁶²

Almost immediately after Congress adopted the 1996 Act, incumbent telecommunications providers lobbied state legislatures to pass laws prohibiting or severely restricting local municipalities’ abilities to provide telecommunications services.

One prominent example of such lobbying efforts took place in Missouri, when Southwestern Bell (later renamed “SBC”) successfully lobbied the Missouri General Assembly to adopt HB 620.¹⁶³ The Missouri bill prohibited any “political subdivision of the state,”¹⁶⁴ including local governments, from

¹⁶² TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 245 (2010).

¹⁶³ See James Baller, Comments of City Utilities of Springfield, Missouri Conditionally Opposing Southwestern Bell’s Application for Leave to Provide In-Region, InterLATA Services in Missouri 1, SBC Communications, Inc., 16 FCC Rcd. 20719 (2001) (CC Docket No. 01-194), 2001 WL 1456806 (comments filed Sept. 10, 2001), <http://ecfsapi.fcc.gov/file/6512765204.pdf> [<http://perma.cc/F5LX-LKDH>].

¹⁶⁴ See Mo. Rev. Stat. § 392.410(7) (2004) (amended 2008):

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or

offering telecommunications services.¹⁶⁵ In response, a collection of Missouri municipalities, non-profit organizations, and public power companies (collectively, “Missouri Municipals”), on behalf of themselves and more than six hundred Missouri municipalities and sixty-three electric utilities, petitioned the FCC to preempt this statute. In their filing, the Missouri Municipals asked the FCC to declare

telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;
- (4) To students by an educational institution; or
- (5) Internet-type services.

¹⁶⁵ Note that the law exempts political subdivisions providing “Internet-type services” but no other telecommunications services. See *id.* Under the statute, a Missouri municipality could provide broadband service, but the ability to provide broadband service but no other services through those cables hinders that municipality’s ability to recoup its capital investment in the network. For example, the municipal broadband networks in Chattanooga, Tennessee and Wilson, North Carolina both offer cable television and telephone service, since those services run through the same municipally-owned cables. Most planned or actual municipal broadband networks also offer the “triple play of voice, video and data,” since the addition of additional services increases the network’s financial viability. See Masha Zager, *Number of Community FTTP Networks Reaches 143*, BROADBANDCOMMUNITYS MAG. Aug.-Sep. 2014, at 14, http://www.bbcmag.com/2014mags/Aug_Sep/BBC_Aug14_CommunityNetworks.pdf [<http://perma.cc/PJ4L-9QAZ>]. Nonetheless, as of writing there are two municipally owned networks in Missouri providing at-home broadband service to a combined roughly 20,000 residents. For the first network, Marshall Municipal Utilities in Marshall, Missouri, the Marshall Board of Public Works owns and operates the network; for the second, liNKCity in North Kansas, Missouri, the city contracts with a private company (DataShack) that operates and maintains the network, which also provides free gigabit Internet service to government facilities, churches, and schools. See H. Trostle, *Municipal FTTH Networks: Missouri*, COMMUNITY NETWORKS (Feb. 6, 2017), <http://muninetworks.org/content/municipal-ftth-networks> [<http://perma.cc/D4SL-VP8Q>]. Several Missouri state legislators have also attempted to advance a number of bills, including as recently as February 2017, which would add additional requirements for municipalities aiming to provide broadband service. See Sean Buckley, *Telco, Cable-backed Missouri Bill Could Limit Municipal Broadband Growth, Opposition Group Says*, FIERCETELECOM (Feb. 15, 2017, 12:48 PM), <http://www.fiercetelecom.com/telecom/telco-cable-backed-missouri-bill-to-limit-municipal-broadband-growth> [<http://perma.cc/X8TJ-B3WH>]; see also, e.g., Jon Brodtkin, *Municipal Broadband Could Be Restricted Yet Again, this Time in Missouri*, ARS TECHNICA (Jan. 13, 2015, 4:35 PM), <http://arstechnica.com/business/2015/01/municipal-broadband-could-be-restricted-yet-again-this-time-in-missouri> [<http://perma.cc/VYA3-3F3C>].

Missouri's prohibition "unlawful and unenforceable" because it violated section 253(a) of the Communications Act, fell outside the scope of section 253(b), and thus qualified for preemption under section 253(d).¹⁶⁶ The relevant text of the section 253 statute read as follows:

47 U.S.C. §253 – Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.¹⁶⁷

To the Missouri Municipals, the language of section 253(a) was clear: "No State" may prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service." Missouri's statute prohibited "any entity" (in this case, municipally owned utilities) from providing telecommunications service. Thus, Missouri's statute violated section 253(a).¹⁶⁸

The FCC denied the Missouri Municipals' petition. The agency rejected Missouri Municipals' statutory interpretation,

¹⁶⁶ Mo. Mun. League, 16 FCC Rcd. 1157, 1158 (2001).

¹⁶⁷ 47 U.S.C. § 253 (2000).

¹⁶⁸ See Mo. Mun. League, 16 FCC Rcd. at 1161.

and explained that “municipalities, as political subdivisions of the state, are not ‘entities’ within the meaning of section 253(a).”¹⁶⁹ Following the “plain statement” rule¹⁷⁰ set forth in the Supreme Court’s 1991 *Gregory v. Ashcroft* decision, the FCC reasoned, “a court must not construe a federal statute to preempt traditional state powers unless Congress has made its intention to do so unmistakably clear in the language of the statute.”¹⁷¹ The FCC said that it was not sufficiently clear that Congress intended “any entity” to include publicly owned utilities. Thus, preempting Missouri’s statute would unduly insert the FCC between a state and its political subdivisions, an outcome not intended by section 253.¹⁷²

There are at least two reasons that the FCC’s denial of Missouri Municipals’ petition was odd.

First, the FCC had previously construed Congressional telecommunications enactments as applying equally to public and private providers,¹⁷³ and just four years earlier interpreted “any entity” as applying to both municipally owned and for-profit telecommunications services.¹⁷⁴ It was not clear why a different principle would apply in this case.¹⁷⁵

Second, the FCC majority claimed it supported municipal broadband, and three Democratic FCC appointees issued or joined two statements accompanying their denial of Missouri Municipals’ petition. FCC Chairman Kennard and Commissioner Tristani emphasized in their joint statement that they voted “reluctantly” to deny the preemption petition, given the negative outcome their decision would have for

¹⁶⁹ *Id.* at 1164.

¹⁷⁰ See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control* 6-7 (U. Mich. Law Sch. Working Paper No. 99-001, 1998), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=96708 [<http://perma.cc/X8B5-8MQY>] (“The ‘plain statement’ rule in *Gregory* protects federalism through the *national* political process by barring federal intrusions into state sovereignty absent a clear congressional statement to the contrary.”).

¹⁷¹ *Mo. Mun. League*, 16 FCC Red. at 1160 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

¹⁷² *Id.* at 1164.

¹⁷³ See Travis, *supra* note 43, at 1728 (“Before disputes regarding municipal provision of telecommunications services were brought to its attention, the FCC construed the telecommunications laws in such a way that Congressional enactments would apply equally to public and private telecommunications providers.”).

¹⁷⁴ *Id.* at 1728 (“For example, in 1992, the FCC determined that the term ‘any corporation’ in the 1934 Act included public telephone utilities. Similarly, in 1997, the FCC concluded that the term ‘any entity’ in the 1996 Act extended to municipal telecommunications firms for purposes of their universal service obligations.”).

¹⁷⁵ See, e.g., Dunne, *supra* note 159, at 1147 n.156 (“It is not clear why the FCC was not similarly reluctant in the *Abilene* ruling.”).

Missouri residents.¹⁷⁶ The Commissioners acknowledged members of Congress had sent them letters stating “unequivocally” that it was Congress’ intent to grant the FCC authority to preempt state or local laws that unreasonably restrict any entity, whether public- or privately owned, from providing telecommunications services.¹⁷⁷ The Commissioners urged Congress to “consider amending the language in section 253(a) to address clearly municipally-owned entities,”¹⁷⁸ and asked states to consider measures other than outright bans on municipal broadband networks. Still, the 3-2 Democratic majority let Missouri’s restrictions stand.

Two other factors may have affected the FCC’s decision: precedent and politics.

First, the FCC had recently denied a similar petition from the City of Abilene, Texas, on the grounds that “any entity” was not sufficiently clear.¹⁷⁹ The City of Abilene appealed to the D.C. Circuit, which upheld the FCC’s decision on grounds that it was not plain to the FCC, or the court, that municipalities would qualify as “any entity.”¹⁸⁰ When the FCC denied Missouri Municipals’ petition, it pointed to its denial of Abilene’s petition and the D.C. Circuit decision upholding it.¹⁸¹

Second, at the time of the Missouri Municipals’ petition, the FCC had poor relations with states, and the agency was wary of overly intruding into state affairs.¹⁸² Two years earlier, the Eighth Circuit had ruled that the FCC had disrupted the balance between federal and state power and exceeded its jurisdiction when it established pricing rules over local telephone service.¹⁸³ As a result, the FCC facing Missouri Municipals “may have been overly solicitous of states’ rights, and reluctant to assert its authority against the internal political affairs of states.”¹⁸⁴ Moreover, the agency’s denial came in the midst of the Rehnquist Court’s “‘revival’ of federalism,”¹⁸⁵ a series of five-to-four cases that expanded state sovereignty at the expense of congressional and federal court

¹⁷⁶ *Mo. Mun. League*, 16 FCC Rcd. at 1172.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See Pub. Utils. Comm’n of Tex.*, 13 FCC Rcd. 3460 (1997).

¹⁸⁰ *See City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

¹⁸¹ *Mo. Mun. League*, 16 FCC Rcd. at 1164.

¹⁸² *See Carlson, supra* note 113, at 58 (“Why did the FCC refuse to preempt the Texas law in Public Utility Commission? Political considerations may have entered into the decision. The FCC had poor relations with the states at the time it ruled on the Texas case.”).

¹⁸³ *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997).

¹⁸⁴ *Carlson, supra* note 113, at 58 (“The Eighth Circuit had recently criticized the FCC for treading on states’ rights and exceeding its jurisdiction in the deregulation of local telephony . . .”).

¹⁸⁵ *Travis, supra* note 43, at 1729.

jurisdiction.¹⁸⁶ The FCC may have been reticent to preempt state laws under section 253 for fear that the Rehnquist Court would overrule the agency, and further weaken its regulatory authority.

The Missouri Municipals would later face this Rehnquist Court. But first, they appealed their case to the Eighth Circuit Court of Appeals, which sided with them and unanimously vacated the FCC's denial of their preemption petition.

A. The Eighth Circuit Unanimously Overturns the FCC

In a succinct, unanimous ruling barely reaching five pages, the Eighth Circuit Court of Appeals vacated and remanded the FCC's denial of the Missouri Municipals' petition.

1. Section 253(a) is a "Plain Statement"; the FCC Creates Ambiguity Where None Exists

Like the FCC, the Court of Appeals ruling focused most of its decision on the meaning of the "any entity" language in section 253. However, where the FCC found "any entity" to be ambiguous as to congressional intent, the Court of Appeals found the opposite—that the statute's meaning was clear, such that "we should not strain to create ambiguity where none exists."¹⁸⁷

Under the *Gregory* standard, the Court of Appeals reasoned, "[W]e should ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law."¹⁸⁸ The Court of Appeals reasoned that section 253 satisfied both the *Gregory* plain-statement rule and *Chevron's* clear-statement rule¹⁸⁹: under a plain-language reading of the

¹⁸⁶ See *id.* ("Starting in the 1980s, the Supreme Court, under Chief Justice William Rehnquist, orchestrated a 'revival' of federalism, or even a 'revolution' in states' rights. Specifically, the Court expanded state sovereignty at the expense of federal constitutional rights, the powers of the U.S. Congress, and the jurisdiction of the federal courts. In a series of five-four decisions, the Court unshackled the states from constitutional and Congressional limitations, in cases frequently involving the abuse of individual rights by powerful state officials and private actors.").

¹⁸⁷ *Mo. Mun. League v. FCC*, 299 F.3d 949, 953 (8th Cir. 2002).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 951 ("We review agency determinations under the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we must defer to a reasonable interpretation of the statutory provision made by the agency.").

statute and absent further instruction from Congress, the word “entity” would include municipalities and municipally owned utilities.

2. The FCC Unduly Narrows the Meaning of the Modifier “Any”

Satisfied that “entity” would encompass municipalities and municipally owned utilities under the plain meaning of the term, the Court of Appeals next considered the meaning of the modifier “any.” In so doing, it concluded, “Congress’s use of ‘any’ to modify ‘entity’ signifies its intention to include within the statute all things that could be considered as entities.”¹⁹⁰

For the Court of Appeals, the “any” modifier was significant given the Supreme Court’s unanimous decision in the 1997 case *Salinas v. United States*,¹⁹¹ which held that the term “any” in a federal bribery statute lent itself to a broad interpretation of Congress’ statutory authority.¹⁹² For the Court of Appeals, *Salinas*’s “fundamental holding” was that Congress may “change the balance of state and federal powers when it employs plain language to do so.”¹⁹³ In *Salinas*, the Supreme Court held that “by using the clearly expansive term ‘any,’ Congress expressed its intent to alter this relationship.”¹⁹⁴ Citing *Salinas* and other cases, the Court of Appeals concluded: “time and time again the [Supreme] Court has held that the modifier ‘any’ prohibits a narrowing construction of a statute.”¹⁹⁵

In sum, between the ordinary definition of “entity” and the expansive scope of the modifier “any,” the Eighth Circuit found that municipalities would be encompassed as “any entity”

¹⁹⁰ *Id.* at 953-54.

¹⁹¹ 522 U.S. 52 (1997).

¹⁹² *See Mo. Mun. League*, 299 F.3d at 954 (“In *Salinas v. United States*, the Court was called upon to decide whether the federal bribery statute, which applies to ‘any business transaction,’ applies only to bribes affecting federal funds. The defendant, who had bribed a state official, argued that because the bribery statute upset the federal-state balance, the *Gregory* plain-statement rule required a plain statement of congressional intent that the bribery statute apply to bribes having no effect on federal funds. In holding that the bribery statute included bribes of state officials, even where no federal funds were affected, the Court stated that ‘the word “any,” which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.’ The Court also stated that ‘the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute’s terms.’” (quoting *Salinas*, 522 U.S. 52)).

¹⁹³ *Id.* at 955.

¹⁹⁴ *Id.*; *see also* Travis, *supra* note 43, at 1732-33 (“Congress’s insertion of the word ‘any’ before ‘entity’ removed whatever slight doubt might have remained, for the use of ‘any’ prior to a noun had been repeatedly held by the Supreme Court to encompass all instances of the noun to which it refers.”).

¹⁹⁵ *Mo. Mun. League*, 299 F.3d at 954.

under section 253(a) as well.

3. Rejecting the D.C. Circuit's *Abilene* Decision, Creating the Circuit Split

The Court of Appeals also rejected the D.C. Circuit's *Abilene* opinion limiting the FCC's section 253 authority. The Court of Appeals criticized the D.C. Circuit's focus on Congress' "tone of voice" rather than the language of the statute¹⁹⁶ and pointed out that the D.C. Circuit ruling did not even mention *Salinas*,¹⁹⁷ an omission that "detract[ed] from the persuasiveness of its opinion."¹⁹⁸ With "all due deference to our sister circuit's holding,"¹⁹⁹ the court held, "we do not find *City of Abilene* to be persuasive."²⁰⁰

B. The Supreme Court Limits Section 253

Because the Eighth and D.C. Circuits split on the meaning of section 253(a), the Supreme Court granted certiorari in 2004 to resolve the conflict. The Court heard oral arguments in January 2004 and issued its ruling two months later.

1. Majority Opinion: FCC Cannot Preempt Under Section 253, Mostly for Prudential Reasons

In an eight-to-one opinion authored by Justice Souter (joined in part by Justices Thomas and Scalia), the Court ruled against the Missouri Municipals, and held that the 1996 Act did not allow FCC to preempt state laws that restricted or prohibited municipal telecommunications services.²⁰¹

The Supreme Court's decision did not rest on the "writing on the page"²⁰²—that is to say, the plain text of section 253—and in this regard the Court departed from both the D.C. Circuit and Eighth Circuit holdings. Instead, the Court took a more prudential approach, ruling that reading section 253 to allow preemption of state laws would create "strange and

¹⁹⁶ See *id.* at 955 ("We find no reference in any of the Supreme Court's decisions regarding the word 'any' about Congress's 'tone of voice' and 'emphasis.'").

¹⁹⁷ See also Petitioners' Brief at *5, *Mo. Mun. League*, 299 F.3d 949 (8th Cir. 2002) (No. 01-1379), 2001 WL 34090959 ("The D.C. Circuit's failure to apply or even mention *Salinas* is especially noteworthy and troubling because the Supreme Court decided *Salinas* while the *Abilene* case was on appeal and *Abilene* petitioners relied heavily on that case in their reply brief and oral argument.").

¹⁹⁸ *Mo. Mun. League*, 299 F.3d at 954.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).

²⁰² *Id.* at 132.

indeterminate results”²⁰³ that Congress could not have possibly meant, and therefore Congress must not have given the FCC this authority. The Court listed three “strange” consequences on which it based this conclusion.

First, preemption would be ineffectual, because “preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place.”²⁰⁴ In other words, even if the FCC preempted a state law for a municipality hoping to provide telecommunications service, that municipality would still be powerless to offer telecommunications services “in the absence of some further, authorizing legislation.”²⁰⁵

Second, preemption would create a “national crazy quilt,” because some municipalities would be allowed to provide telecommunications services (if explicitly authorized to do so by their state), whereas municipalities in states next door without such general authority could not.²⁰⁶

Third, preemption would create a “one-way ratchet”: state governments could move only *towards* authorizing public provision of telecommunications service, “with no alternative to reverse course deliberately later on.”²⁰⁷ In other words, a State could give a political subdivision (“entity”) the power to administer broadband service, but the State could not take this power away from entities to which it had already given this power, because the FCC could preempt such a law under section 253.²⁰⁸ The Court concluded its prudential analysis:

In sum, § 253 would not work like a normal

²⁰³ See *id.* at 133.

²⁰⁴ *Id.* at 134.

²⁰⁵ *Id.* at 135.

²⁰⁶ *Id.* at 136 (“If the special statute were preempted, a municipality in that State would have a real option to enter the telecommunications business if its own legislative arm so chose and fund the venture. But in a State next door where municipalities lacked such general authority, a local authority would not be able to, and the result would be a national crazy quilt.”).

²⁰⁷ *Id.* at 137-38.

²⁰⁸ *Id.* at 136-37 (“Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of § 253 narrowed the authorization so as to leave municipalities authorized to enter only the water business. The repealing statute would have a prohibitory effect on the prior ability to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later.”).

preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. We think it farfetched that Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase “ability of any entity.”²⁰⁹

In fact, the Court did not address the issue that created the circuit split—whether the meaning of “any entity” was sufficiently clear—*until the very last paragraph of the very last page of its sixteen-page opinion*. Here, the Court found that a “complementary principle,” the *Gregory* standard, would lead to the same conclusion that Congress did not mean to give the FCC the authority to preempt here.²¹⁰ The Court held that the language of section 253 was insufficiently clear as to whether “any entity” included municipalities, and so the statute failed to pass the *Gregory* test. The Court stated that “‘ability of any entity’ is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.”²¹¹ Absent a more “unmistakably clear” statement, the Court concluded that section 253 preemption did not apply to publicly owned utilities.²¹²

Justices Scalia and Thomas joined only with respect to the last paragraph of the majority opinion, and they filed a short two-paragraph concurrence of their own.

2. Justices Scalia and Thomas’s Surprising Concurrence, on a Textual Basis

In oral arguments before the Supreme Court, Justice Scalia challenged the State of Missouri’s counsel, Ronald Molteni, to explain how section 253(a)’s “any entity” language could be clearer:

ANTONIN SCALIA: Why isn’t ‘any entity’ clear?

. . . *I mean what* . . .

RONALD MOLTENI: Justice Scalia . . .

ANTONIN SCALIA: What do they have to say to

²⁰⁹ *Id.* at 138.

²¹⁰ *Id.* at 140.

²¹¹ *Id.* at 141.

²¹² *Id.*

make any . . . ‘any entity’ clear? ‘Paren, and we really mean it?’ [Laughter] Or it has to say any entity whatsoever? Would that be clear?

RONALD MOLTENI: Justice Scalia, there are no magic words, and we’re not asserting that there are magic words that need to be there. There has to be some terminology within the statute that . . . that demonstrates that Congress was cognizant it intended to intrude on State government.²¹³

Despite his expressed incredulity during oral argument about a narrowed interpretation of “any entity,” Justice Scalia (joined by Justice Thomas) ultimately concurred with the majority’s one-paragraph “complementary principle” that “any entity” was insufficiently clear.²¹⁴

In the concurrence, Justice Scalia joined the Court’s one-paragraph “any entity” analysis but not any other part of the opinion, including its analysis of purported policy consequences. Although Justice Scalia agreed that preemption would have “several unhappy consequences,” he emphasized that his decision was on textual, not policy, grounds: “I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text.”²¹⁵ The majority opinion did not follow Justice Scalia’s advice, and the structure of the opinion (with the lion’s share discussing policy consequences and only one paragraph interpreting the text of the statute as a “complementary” consideration) suggests a ruling based more on policy than on statutory interpretation.²¹⁶

Just two years prior to *Missouri Municipal League*, Justice Scalia had described the *Gregory* standard as a “relatively modest burden.”²¹⁷ Nonetheless, here Justices Scalia and Thomas argued that the last paragraph of the majority’s opinion—the “complementary consideration” paragraph discussing the *Gregory* standard—was the *only* part of the opinion on which they cast their vote.²¹⁸ Still, their explicit

²¹³ Oral Argument at 14:53, *Nixon*, 541 U.S. 125 (2004) (Nos. 02-1238, 02-1386, 02-1405), <http://www.oyez.org/cases/2003/02-1238> [<http://perma.cc/N7FV-9A7M>].

²¹⁴ *Nixon*, 541 U.S. at 141 (Scalia, J., concurring in the judgment).

²¹⁵ *Id.*

²¹⁶ See Sylvain, *supra* note 47, at 818 (“The Court, of course, did not heed Justice Scalia’s advice. To the contrary, the question of local ability played a significant role in the opinion.”).

²¹⁷ *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting).

²¹⁸ *Nixon*, 541 U.S. at 141 (Scalia, J., concurring in the judgment) (“Section 253(a) simply does not provide the clear statement which would be required by *Gregory v. Ashcroft* for a statute to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.” (citation omitted)).

disavowal of the Court's parade of policy consequences suggests discomfort with the reasoning undergirding the majority opinion—a discomfort echoed, forcefully, in Justice Stevens' dissent.

3. Justice Stevens' Dissent: Section 253 Means What It Says

In his solo dissent, Justice Stevens began by outlining the “‘common ground’ among the parties”²¹⁹ in the case: that Congress certainly intended for section 253 to apply to utilities. To reinforce this view, Justice Stevens quoted from the Conference Agreement on section 253, which states that “explicit prohibitions on entry by a utility into telecommunications are preempted under this section.”²²⁰ For Justice Stevens, the disagreement before the Court was whether Congress could have expected that utilities would include municipally-owned utilities. Though the petitioners acknowledged “the unmistakable clarity of Congress' intent to protect utilities' ability to enter local telephone markets,” Justice Stevens observed, “they contend[ed] that Congress' intent to protect the subset of utilities that are owned and operated by municipalities is somehow less than clear.”²²¹ Looking at the language of the rest of the statute, Justice Stevens argued, this reading is highly implausible.

To Justice Stevens,

the assertion that Congress could have used the term ‘any entity’ to include utilities generally, but not *municipally owned* utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting section 253. Both propositions are manifestly implausible²²²

The first assumption—that Congress was unaware of the existence of municipally owned utilities—would be an incredible claim, given the number of such utilities operating in the country. The second assumption—that Congress ignored the existence of municipally owned utilities in drafting section 253—seems equally unlikely, given that the statute makes explicit reference elsewhere to municipally owned utilities,

²¹⁹ *Id.* at 143 (Stevens, J., dissenting).

²²⁰ S. REP. NO. 104-230, at 127 (1996); see *Nixon*, 541 U.S. at 143 (Stevens, J., dissenting).

²²¹ *Nixon*, 541 U.S. at 143 (Stevens, J., dissenting).

²²² *Id.*

even as subdivisions of the State.²²³

Since both of these assumptions are implausible, Justice Stevens argued, “there is every reason to suppose Congress meant precisely what it said: No State or local law shall prohibit or have the effect of prohibiting the ability of *any* entity, public or private, from entering the telecommunications market.”²²⁴ For Justice Stevens, the statute as written was limited in scope and did not affirmatively force states to grant new authority to their political subdivisions.²²⁵

Justice Stevens then addressed the remaining question, “whether reading the statute to give effect to Congress’ intent necessarily will produce the absurd results that the Court suggests.”²²⁶ Here, Justice Stevens’ dissent and Justices Scalia and Thomas’ concurrence found common ground: both agreed that the majority’s opinion unnecessarily rested on policy determinations, rather than on principles of statutory interpretation and precedent. For Justice Stevens, the majority’s parade of horrors was “particularly inappropriate” given that section 253 preemption was not automatic, but depended on an FCC determination.²²⁷

Justice Stevens also took issue with the Court’s assertion that preemption would create a “crazy quilt” of inconsistency among states since only some states would allow cities to provide telecommunications services. If this were true, he argued, permitting Missouri and other states to ban municipal broadband would hardly help the cause of consistency.²²⁸ Moreover, a “crazy quilt” that is the product of choices by Congress is “no more absurd than the ‘crazy quilt’ that will

²²³ Stevens referred to the Pole Attachments Act, 47 U.S.C. § 224, which excludes utilities “owned by . . . any State,” including its political subdivisions—a clear indication that Congress was aware that many utilities are in fact owned by States and their political subdivisions.” *Id.* at 144.

²²⁴ *Id.*

²²⁵ *Id.* at 146 (“As I read the statute, the one thing a State may not do is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services.”).

²²⁶ *Id.* at 144.

²²⁷ *Id.* at 147-48 (“Rather than assume that the FCC will apply the statute improperly, and rather than stretch our imaginations to identify possible problems in cases not before the Court, we should confront the problem presented by the cases at hand and endorse the most reasonable interpretation of the statute that both fulfills Congress’ purpose and avoids unnecessary infringement on state prerogatives.”).

²²⁸ *Id.* at 146; see also Davidson, *supra* note 157, at 1020 (“As to the *Nixon* Court’s arguments from disuniformity and one-way ratchets, the Court appears not to have considered the possibility that an entirely different (and presumably, to Congress, more pernicious) ‘crazy quilt’ results from protecting state plenary authority . . . The Court could just as easily have drawn the exact opposite conclusion from its hypothetical—that the cause of the disparity was not federal preemption but state control. What is missing from *Nixon* is any recognition of the ability of local governments to advance a national regulatory scheme.”).

result from leaving the matter of municipal entry entirely to individual States' discretion."²²⁹

In sum, Justice Stevens reasoned, the interpretation of section 253 does not “turn on which side has the better view in this policy debate. It turns on whether Congress itself intended to take sides when it passed the 1996 Act.”²³⁰ Given the plain language of the statute and its legislative history, he concluded, the statute granted the FCC authority to preempt state laws that unreasonably restricted “any entity” (including municipally owned utilities) from providing telecommunications services.

4. The Lasting *Missouri Municipal League* Legacy: Restricting Public Broadband

Just as Justice Stevens predicted, the Court's *Missouri Municipal League* ruling did not prevent the “national crazy quilt” it ostensibly aimed to avoid. Rather, it facilitated it. In the two years following the *Missouri Municipal League* ruling, ISPs launched a rush of intensive lobbying efforts that convinced a number of state legislatures to pass restrictions on municipal broadband.²³¹ Today, around twenty states have enacted such laws, and ISPs continue to lobby for restrictive laws in others.²³² The other thirty states do not have these restrictions—some municipalities in those states have municipal broadband networks, while others do not. A crazy quilt, indeed.²³³

²²⁹ *Nixon*, 541 U.S. at 146 (Stevens, J., dissenting).

²³⁰ *Id.* at 142.

²³¹ See, e.g., Blevins, *supra* note 102, at 109 (“The significance of *Nixon*, then, is that the Court both upheld the legality of the states’ post-1996 Act restrictions on municipal entry, and opened the door for new legislative restrictions. *Nixon*’s significance was not lost on state legislatures, nor upon incumbent carriers. Seizing the opportunity *Nixon* provided, incumbent carriers immediately launched an intensive lobbying effort in multiple states to enact further restrictions on municipal entry into the broadband market. Several states ultimately enacted new restrictions, while others came very close to doing so. These restrictions came at a critical, and vulnerable, time for municipal broadband. Indeed, at the very moment most municipal broadband projects were being proposed and financed, *Nixon* had handed incumbent carriers a potent new weapon to stifle them.”).

²³² See Koebler, *supra* note 125; see also Holmes, *supra* note 86.

²³³ Another example of the crazy quilt: In 2017, private ISPs lobbied the Virginia state legislature to pass a bill that would ban municipal broadband deployment in any city where a private ISP offered ten megabits per second download speed and one megabyte per second upload speed; both speeds are less than half of what the FCC defines as the minimum speeds to be considered “broadband Internet”. Under that bill, any Virginia city with a single provider offering that speed could continue to languish in digital darkness, while a nearby city without any providers at all could build a municipal broadband network serving speeds one hundred times faster. See Jon Brodtkin, *Virginia “Broadband Deployment Act” Would Kill Municipal*

Some have argued that the failure of more municipalities to provide broadband service cannot be tied to the *Missouri Municipal League* ruling alone, since some restrictions (e.g., requiring voters to approve a public network via referendum) can and have been overcome.²³⁴

However, even municipalities operating in states without state restrictions face well-funded opposition.²³⁵ Private ISPs invest heavily in litigation and lobbying for regulatory hurdles to prevent public broadband deployment, even in cities where such deployment is allowed by law.²³⁶ Moreover, restrictions in other states carry a *signaling* effect, telling municipalities in restriction-free states that their efforts to create municipal broadband “will be opposed, and thus will be more expensive to construct.”²³⁷

When private ISPs lobby governments against public broadband, their goals can include slowing public broadband deployment, increasing its cost, or pushing a city towards ownership models that let a private provider, not the city itself, earn the lion's share of profits from operating the last-mile network. For example, when Chattanooga announced its intention to build a municipal broadband network, Comcast filed for a declaratory injunction just hours before the city voted on whether to upgrade its electrical grid and provide a publicly owned broadband network.²³⁸ Despite the lingering threat of suit, the city approved the plans and defeated Comcast's suit in court, including again on appeal.²³⁹

Broadband Deployment, ARS TECHNICA (Jan. 13, 2017, 12:31 PM), <http://arstechnica.com/tech-policy/2017/01/virginia-broadband-deployment-act-would-kill-municipal-broadband-deployment> [http://perma.cc/Y52L-KTK7].

²³⁴ See O’Rielly, *supra* note 127 (“Requir[ing] a referendum by individual localities within a state seeking to offer broadband services . . . doesn’t seem to be an unreasonable or unachievable burden. For instance, a number of Colorado localities successfully conducted the requisite referendums in November’s election. Any added costs or time would be offset by the protections of local taxpayer funding and assurances of community support for such networks.”).

²³⁵ Efforts to municipalize electricity service often fail when faced with well-financed utility opposition. See Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 344 (2017) (“Even where legal, municipalization and CCA efforts often falter in the face of robust utility opposition.”). The municipal provision of Internet services has and will almost certainly continue to face well-financed opposition.

²³⁶ For example, incumbent ISPs have sued cities over pole-sharing ordinances, and fighting those suits increases the time and expense required of any new competitor (public or private) hoping to offer service. See *supra* note 126.

²³⁷ Blevins, *supra* note 102, at 111-12 (discussing this phenomenon, called “phantom legislation”).

²³⁸ *Comcast Sues EPB in Hamilton County on Eve of Bond Issue*, CHATTANOOGAN (Apr. 22, 2008), <http://www.chattanooga.com/2008/4/22/126367/Comcast-Sues-EPB-In-Hamilton-County.aspx> [http://perma.cc/8CE7-BSQS].

²³⁹ *Appeals Court Upholds EPB in Lawsuit by Comcast*, CHATTANOOGAN (May 13,

For all its success, the reach of Chattanooga's municipal broadband network—and the ability to replicate it elsewhere in the state and elsewhere in the country—is hamstrung by the lasting legacy of *Missouri Municipal League*. Over a decade after *Missouri Municipal League*, the FCC—this time more willing to flex its regulatory authority—decided to try another way to preempt state-level municipal broadband restrictions, this time using its section 706 authority.

V. *TENNESSEE V. FCC: THE LIMITS OF SECTION 706*

“[Municipal broadband] changed our conceptions of who we are and what is possible. Before we had never thought of ourselves as a technology city.”

—Andy Berke (Mayor, Chattanooga, TN)²⁴⁰

Chattanooga's success with municipal broadband had the small city thinking big. In 2014, its municipal broadband provider, EPB, wanted to expand its network to nearby municipalities. Its effort was stymied by a Tennessee law that prohibited an electric utility from providing Internet service beyond its electric service footprint.²⁴¹ Reasoning that this restriction was an “impermissible barrier to broadband deployment,”²⁴² EPB petitioned the FCC for preemption of Tennessee's law.

The city of Wilson, North Carolina was in a similar predicament. Wilson also deployed a municipal broadband network, and while North Carolina permitted municipal entities to provide broadband service, a 2011 state law

2009), <http://www.chattanoogan.com/2009/5/13/151121/Appeals-Court-Upholds-EPB-In-Lawsuit.aspx> [<http://perma.cc/98K4-2M2E>].

²⁴⁰ Jamie McGee, *Chattanooga Mayor: Gigabit Speed Internet Helped Revive City*, TENNESSEAN (June 14, 2016, 5:23 PM CT), <http://www.tennessean.com/story/money/2016/06/14/chattanooga-mayor-gigabit-speed-internet-helped-revive-city/85843196> [<http://perma.cc/VCU6-KSYY>].

²⁴¹ TENN. CODE ANN. § 7-52-601 (2011) (“(a) Each municipality operating an electric plant described in § 7-52-401 has the power and is authorized within its service area . . . to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant, or equipment for the provision of cable service, two-way video transmission, video programming, Internet services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality.”).

²⁴² Petition of the Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-116 at 1 (July 24, 2014).

effectively prohibited Wilson from expanding its network to the five adjacent counties that comprised its electric service territory.²⁴³ North Carolina's state legislature enacted these restrictions in a bipartisan vote, after incumbent ISPs—Time Warner Cable, CenturyLink, and AT&T—spent over one million dollars lobbying in favor of the bill,²⁴⁴ and gave campaign contributions to several of the bill's co-sponsors.²⁴⁵ Because Wilson's network predated the restrictions, it was "grandfathered" (exempted) from some of the bill's provisions, but not all.²⁴⁶ The provisions that still applied effectively precluded Wilson from expanding its network.²⁴⁷

Together, Wilson and Chattanooga petitioned the FCC for preemption of these state restrictions, which would grant them the right to expand their municipal broadband networks.

A. *The New FCC Grants Preemption, but Under Section 706*

Chattanooga and Wilson submitted their 2014 preemption petitions to a very different FCC, politically speaking, from the agency that rejected Missouri Municipals' preemption petition a decade earlier. Missouri Municipals' petition was rejected under FCC Chairman William Kennard, a Clinton appointee whose FCC took a "cautious approach to Internet issues"²⁴⁸ and

²⁴³ See *City of Wilson*, 30 FCC Rcd. 2408, 2427 (2015).

²⁴⁴ See *id.* at 2426.

²⁴⁵ See David Hudnall, *What's Standing Between Rural North Carolina and Reliable Internet Service?*, INDYWEEK (Nov. 9, 2016), <http://www.indyweek.com/indyweek/whats-standing-between-rural-north-carolina-and-reliable-internet-service/Content?oid=5084640> [<http://perma.cc/GW8R-G3KL>] ("Legislators from both sides of aisle [sic] supported HB 129. Marilyn Avila, a Republican representing Wake County, sponsored the bill. Campaign finance reports show that Avila has received over \$20,000 from Time Warner Cable, AT&T, and CenturyLink since 2010. A cosponsor of HB 129, Democrat William Wainwright, received over \$13,000 from those three companies before his death in 2012. Another Democratic cosponsor, Becky Carney, has received \$12,000 from AT&T, Time Warner Cable, and CenturyLink since 2008. The fourth cosponsor, Julia Howard, a Republican representing Forsyth, received \$6,000 from those companies prior to her vote.").

²⁴⁶ See Brief of Intervenor in Support of Respondents City of Wilson, Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016) (Nos. 15-3291/3555), 2015 WL 6854344, at *18.

²⁴⁷ *Id.*

²⁴⁸ Elizabeth Wasserman, *Congress Doubts FCC Up to Managing Internet*, CNN (Mar. 16, 1999, 11:16 AM EST), <http://www.cnn.com/TECH/computing/9903/16/fcc.idg> [<http://perma.cc/3LRH-T8C2>]; see also John Simons, *FCC Chief Talks a Tough Game, but Backs Down on the Key Issues*, WALL STREET J. (June 19, 1998, 11:59 PM ET), <http://www.wsj.com/articles/SB8981395816309000> [<http://perma.cc/DED3-63D9>] (echoing this view).

who now serves on the Board of Directors at AT&T.²⁴⁹ When President Obama appointed Tom Wheeler, a former lobbyist for telecommunications firms, to lead the FCC, former clients Comcast and AT&T were enthused, while consumer groups worried he would continue to defer to incumbent ISP interests.²⁵⁰ But Wheeler did not follow his predecessors' timidity.²⁵¹

Once appointed, Wheeler "turn[ed] the FCC into a sharply pro-consumer and pro-competition agency."²⁵² Wheeler seemed to relish picking fights with "the industry that he used to represent,"²⁵³ and earned a reputation as a "Dragonslayer"²⁵⁴

²⁴⁹ See William Kennard Joins AT&T Board of Directors, AT&T NEWSROOM (Nov. 7, 2014), http://about.att.com/story/william_kennard_joins_att_board_of_directors.html [<http://perma.cc/4SNP-MFS9>]. The FCC, like some other government agencies, frequently operates with a "revolving door": regulators move from working for the agency to working for companies the agency regulates, and vice versa. Kennard's successor, Michael Powell (son of former Secretary of State Colin Powell), now leads the National Cable and Telecom Association, which spends millions of dollars each year lobbying on behalf of its clients, including its largest client, Comcast. Some have argued the "revolving door" often creates a conflict of interest at the agency, leading regulators to advance industry goals over the public interest. John Dunbar, *The FCC's Rapidly Revolving Door*, CTR. FOR PUB. INTEGRITY (Feb. 19, 2003, 12:00 AM), <http://www.publicintegrity.org/2003/02/19/6581/fccs-rapidly-revolving-door> [<http://perma.cc/83PW-HNQ5>]; One particularly high-profile example of a potential conflict of interest at the FCC came in 2011, when FCC Commissioner Meredith Atwell Baker joined Comcast just four months after approving its merger with NBC Universal. See Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME (Jan. 9, 2013), <http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility> [<http://perma.cc/TB8L-X5XH>] ("After spending a year as a top tech advisor to President Obama, Crawford concluded that federal policy makers have little incentive to upset the telecom and cable giants This has led to what some legal scholars call 'regulatory capture' at the Federal Communications Commission . . .").

²⁵⁰ See Jon Brodtkin, *Uh-Oh: AT&T and Comcast are Ecstatic about the FCC's New Chairman*, ARS TECHNICA (May 1, 2013, 5:40 PM), <http://arstechnica.com/tech-policy/2013/05/uh-oh-ats-new-chairman> [<http://perma.cc/CUS4-S5UL>].

²⁵¹ One exception is FCC Commissioner Mignon Clyburn's "brief, ridiculously productive reign" as interim FCC Chairwoman for six months in 2013. Chris Zeigler, *The Brief, Ridiculously Productive Reign of FCC Chairwoman Mignon Clyburn*, VERGE (Nov. 4, 2013), <http://www.theverge.com/2013/11/4/5065070/the-brief-ridiculously-productive-reign-of-fcc-chairwoman-mignon-clyburn> [<http://perma.cc/JY7H-W6EC>].

²⁵² Nilay Patel, *The Dragonslayer*, VERGE (Mar. 9, 2016), <http://www.theverge.com/2016/3/9/11181450/fcc-chairman-tom-wheeler-interview-5g-internet-net-neutrality> [<http://perma.cc/X9ZT-XZ7S>].

²⁵³ Jon Brodtkin, *Why the Ex-Cable Lobbyist Running the FCC Turned Against His Old Clients*, ARS TECHNICA (May 1, 2013, 11:44 AM), <http://arstechnica.com/business/2013/02/why-the-ex-cable-lobbyist-running-the-fcc-turned-against-his-old-clients> [<http://perma.cc/X8AU-VH5J>].

²⁵⁴ Patel, *supra* note 252.

who would ensure that powerful incumbents such as Comcast, Verizon, and AT&T followed net neutrality rules, obeyed users' privacy, and reserved wireless spectrum for competitive carriers.²⁵⁵ In other words, Wheeler may have been the "closest thing to a true populist the modern FCC has ever had."²⁵⁶

Both Wheeler and President Obama were strong public proponents of public broadband. Both traveled to areas with community broadband networks and promoted their potential. In June 2014, Wheeler publicly stated that the FCC, if given the opportunity, would "exercise[] its power to preempt state laws that ban or restrict competition from community broadband."²⁵⁷ Less than one month later, Chattanooga and Wilson submitted their preemption petitions to the FCC.

After evaluating the two petitions, the FCC preempted the relevant provisions of Tennessee and North Carolina laws that restricted broadband service, finding that preemption in these cases would "expand broadband investment and deployment, increase competition, and serve the public interest."²⁵⁸ Instead of issuing preemption under section 253, the FCC issued it under section 706. The latter section broadly authorized the FCC to use "regulating methods that remove barriers to infrastructure investment," and where broadband is not adequately deployed, to take "immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."²⁵⁹ Because the FCC found that

²⁵⁵ See *id.* But see Karl Bode, *Trump, GOP Prepare to Gut FCC Boss Tom Wheeler's Populist Reforms . . . Under the False Banner of Populist Reform*, TECHDIRT (Nov. 18, 2016, 6:26 AM), <http://www.techdirt.com/blog/netneutrality/articles/20161117/05533336066/trump-gop-prepare-to-gut-fcc-boss-tom-wheelers-populist-reformsunder-false-banner-populist-reform.shtml> [<http://perma.cc/ME6H-N4FN>] ("Wheeler's tenure floundered a bit at the tail end thanks to the agency's refusal to seriously address zero rating, sneaky industry fees, or usage caps and unreliable meters. Even then, most consumers will remember Wheeler fondly as the first FCC Commissioner in the broadband era from either party that was at least willing to actually listen to the will of the public—a public that's sick to death of uncompetitive broadband markets caused by letting AT&T, Verizon, and Comcast quite literally write protectionist laws that only serve to ensure market dysfunction continues.").

²⁵⁶ *Id.* ("While the future is uncertain, one thing seems likely: Wheeler's shortcomings on subjects like zero rating are going to seem downright charming compared to the regulatory landscape currently being constructed by the next administration. Tom Wheeler, the man who went from dingo to net neutrality hero, was the closest thing to a true populist the modern FCC has ever had.").

²⁵⁷ See Tom Wheeler, *Removing Barriers to Competitive Community Broadband*, FCC BLOG (June 10, 2014, 4:17 PM), <http://www.fcc.gov/news-events/blog/2014/06/10/removing-barriers-competitive-community-broadband> [<http://perma.cc/W9T4-9LHF>].

²⁵⁸ See City of Wilson, 30 FCC Rcd. 2408, 2413 (2015).

²⁵⁹ See *id.* at 2412 (footnotes omitted).

broadband service was not adequately deployed, the agency argued that it had section 706 authority to remove barriers to infrastructure investment, including by preemption of certain state laws.²⁶⁰

The FCC was careful to distinguish its preemption here from its earlier position in *Missouri Municipal League*. Unlike in *Missouri Municipal League*, the agency argued, the “clear statement rule” does not apply because the FCC’s action does not alter the inherent structure of state government. Both Wilson and Chattanooga had underlying state authorization to construct their municipal broadband networks.²⁶¹ Whereas in *Missouri Municipal League* the Court had been concerned that even with preemption a municipality would still be powerless to provide telecommunications service absent express permission from its state, the FCC explained, permission to provide service was not at issue here.²⁶² The FCC said that its Clinton-era decisions concerning the scope of section 253 were not controlling here, and that the questions at issue here were narrower in scope.²⁶³

Although section 253 addressed preemption, the FCC argued, the agency is not required to act pursuant to section 253. Section 706 would suffice to serve as an alternate, “often complementary source of authority . . . [available] regardless of whether section 253 would or would not also apply here.”²⁶⁴ Finally, the FCC argued, the *Missouri Municipal League* Court had sided with the FCC’s interpretation of the scope of its regulatory authority, and courts should do the same here. Here the FCC’s “expert judgment” favored preemption under section 706, so the FCC asked for deference in granting these preemption petitions.²⁶⁵

The FCC’s decision to grant preemption to Chattanooga and

²⁶⁰ See *id.*

²⁶¹ In both cases, authorization to construct municipal broadband networks is limited in scope to specific geographic areas. Tennessee law prohibits EPB in Chattanooga from providing telecommunications services beyond its electric service footprint, see *id.* at 2443, and North Carolina law prohibits Greenlight in Wilson from providing services outside of Wilson County, see *id.* at 2452.

²⁶² See *id.* at 2412 (“The *Nixon* Court was concerned that, if Missouri’s flat ban on municipal telecommunications were preempted, ‘the municipality would still be powerless to enter the telecommunications business in the absence of some further, authorizing legislation.’ However, that is not a concern for our interpretation of §706, which would allow preemption only in cases of underlying authorization.”).

²⁶³ See, e.g., *id.* at 2474 (“More fundamentally, these petitions present a different, narrow question than did *Nixon*, as a comparison to the *Nixon* Court’s reasoning makes clear.”).

²⁶⁴ See *id.* at 2476.

²⁶⁵ See *id.* at 2476-77 (“[I]n *Nixon*, the Court was affirming the Commission’s view. In this case, however, the Commission has reached the conclusion that preemption is necessary [t]o the extent that this reflects the Commission’s expert judgment . . . it would merit deference.”).

Wilson was not unanimous, and both Republican appointees dissented. Commissioner O’Rielly declared the Order both “legally infirm and bad policy.”²⁶⁶ He criticized expanding the FCC’s section 706 authority and declared his categorical opposition to any government entity offering broadband or any other communications service.²⁶⁷

By contrast, then-Commissioner Pai’s dissent made no normative statement about the merits or drawbacks of municipal broadband. Instead, in a dense dissent he termed “Constitutional Law 101,” Commissioner Pai argued that the FCC’s decision to grant preemption violated the separate sovereignty of states guaranteed by the Tenth Amendment, “treating Tennessee and North Carolina as mere appendages of federal government rather than the separate sovereigns that they are.”²⁶⁸ He argued that the *Missouri Municipal League* case already decided that the FCC lacked preemption authority under section 253.²⁶⁹ Moreover, under his analysis, section 706 did not delegate to the FCC any substantive authority, which meant that the agency lacked authority under section 706 to issue any preemption of state law whatsoever, not just in this case.²⁷⁰ If section 253 was insufficient authority to grant preemption, Commissioner Pai argued, section 706 “falls even further short of the mark.”²⁷¹

Soon after the FCC granted preemption, attorneys general for Tennessee and North Carolina filed for judicial review of the order, and the cases were consolidated before the Sixth Circuit Court of Appeals. Like Commissioner Pai, the Sixth Circuit did not believe the FCC had adequately distinguished *Missouri Municipal League*. It reversed the FCC’s preemption order.

B. The Sixth Circuit Overturns The FCC’s Section 706 Attempt

The Sixth Circuit’s three-judge decision—with two judges in favor and one concurring in part and dissenting in part—came

²⁶⁶ See *id.* at 2519 (O’Rielly, Comm’r, dissenting).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 2518 (Pai, Comm’r, dissenting); see *id.* at 2506-07 (discussing the Tenth Amendment, dual sovereignty, and the need for “great skepticism” when federal legislation would interfere with states’ governance over their political subdivisions, including cities).

²⁶⁹ See *id.* at 2508-09.

²⁷⁰ See *id.* at 2517 (“In short, whether one looks at the statute’s text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act.”); see also *Tennessee v. FCC*, 832 F.3d 597, 608 (6th Cir. 2016) (“Commissioner Pai also contended that §706 did not grant the FCC *any* preemption authority whatsoever.”).

²⁷¹ See *City of Wilson*, 30 FCC Rcd. at 2508.

down to the question of whether the FCC had adequately distinguished *Missouri Municipal League*. The judges ruled that the FCC had not, and so *Missouri Municipal League*'s "clear statement" rule still applied. They reversed the FCC's order.

The Sixth Circuit held that *Missouri Municipal League* was still controlling, given the similarity between that case and the questions at issue here.²⁷² The Court argued that a "one-way ratchet" similar to that described in *Missouri Municipal League* could also occur here if the Court of Appeals accepted FCC preemption under section 706: States could grant municipalities authority to operate broadband, but would be unable to place conditions on that service, since the FCC could preempt those conditions under section 706.²⁷³

Given the *Missouri Municipal League* precedent, the Sixth Circuit's holding was understandable,²⁷⁴ and the FCC did not appeal the ruling.²⁷⁵ So long as *Nixon v. Missouri Municipal League* was good law and Congress had not clarified "any entity" to mean, e.g., "any entity including public and private and non-profit entities and political subdivisions," it was difficult for the FCC to show it had preemption authority distinct from that case.²⁷⁶ Since in *Missouri Municipal League*

²⁷² *Tennessee*, 832 F.3d at 611 ("The present case involves two states that likewise have made discretionary determinations for their political subdivisions. [*Missouri Municipal League*] is therefore analogous regarding the clear statement rule and supports the rule's applicability in this case.").

²⁷³ *Id.* ("The FCC sought to distinguish *Nixon* on the ground that there is a difference between preempting a state-law ban on municipal telecommunications providers and preempting state laws regulating municipal broadband providers for which the state has given an underlying authorization. The distinction, however, does not hold up [A] related anomaly, and one equally intrusive on state-municipal relations, is presented. States can flatly prohibit municipalities from engaging in telecommunications altogether, but they cannot do it in limited steps or with conditions based on the governmental nature of the municipalities. This state of affairs, in short, would be at least as anomalous a result.").

²⁷⁴ Cf. Karl Bode, *Appeals Court Strikes Down FCC Attempt to Eliminate Protectionist State Broadband Laws*, TECHDIRT (Aug. 10, 2016, 1:04 PM), <http://www.techdirt.com/articles/20160810/10425135209/appeals-court-strikes-down-fcc-attempt-to-eliminate-protectionist-state-broadband-laws.shtml> [http://perma.cc/SBX9-23YE] ("While the FCC may have been well intentioned, all three Judges noted that the law simply doesn't give the FCC the authority to strip out chunks of state law While the FCC may have gotten too creative under the scope of the law, the end result of the ruling is unfortunate all the same.").

²⁷⁵ Andy Sher, *FCC Won't Appeal Sixth Circuit Court's Decision on Municipal Broadband*, GOV'T TECH. (Aug. 31, 2016), <http://www.govtech.com/network/FCC-Wont-Appeal-Sixth-Circuit-Courts-Decision-on-Municipal-Broadband.html> [http://perma.cc/8BZ7-ZE54].

²⁷⁶ Chairman Pai's preemption dissent accurately predicted the Sixth Circuit's general reasoning. See *City of Wilson*, 30 FCC Rcd. at 2508 ("[I]f section 253 could not clear the high hurdle presented by *Gregory*, section 706 falls even further short of the mark.").

the Supreme Court determined that the statement “any entity” was in fact insufficiently clear to justify FCC preemption under section 253, it would have been a leap for the Sixth Circuit to have allowed FCC preemption under section 706, which does not reference preemption power at all. As the Sixth Circuit held, “it can hardly be argued that section 706 is a clearer directive than section 253; the directives in section 706—to remove barriers and promote competition—do not make clear whether public entities are included.”²⁷⁷

To the FCC’s credit, the Sixth Circuit’s holding was a “limited one,” which did not question the “public benefits that the FCC identifies in permitting municipalities to expand Gigabit [broadband] Internet coverage.”²⁷⁸ Unfortunately, the ruling effectively ended municipal broadband in some areas, including in Wilson’s nearby towns.

For example, before the ruling Wilson’s broadband network had connected its publicly owned network to hundreds of households in the nearby town of Pinetops, population 1,300. Wilson was already providing Pinetops with electricity, so the marginal cost of providing broadband was low.²⁷⁹ Its network was a relief for Pinetops’ residents, offering speeds up to twenty-five times faster than the aging connections of Pinetops’ only broadband provider, CenturyLink DSL.²⁸⁰ After the ruling, however, Wilson would be prohibited from offering paid broadband service to Pinetops and a nearby family farm.²⁸¹ For six months, Wilson held out and provided Pinetops with free broadband access, hoping North Carolina’s state legislature would repeal its public broadband restriction.²⁸² Pinetops’ local government met with North Carolina’s governor and asked for his help repealing the state law. One town commissioner,

²⁷⁷ *Tennessee*, 832 F.3d at 613.

²⁷⁸ *Id.*

²⁷⁹ See *Greenlight Service to Pinetops*, WILSON, N.C. (Mar. 27, 2017), <http://www.wilsonnc.org/communications/greenlight-service-to-pinetops> [<http://perma.cc/9NMA-DLS9>] (“We already had a fiber connection to the substation serving Pinetops, so the remaining infrastructure was inexpensive to install.”).

²⁸⁰ Jon Brodtkin, *Muni ISP Forced to Shut Off Fiber-to-the-Home Internet After Court Ruling*, ARS TECHNICA (Sept. 16, 2016, 12:29 PM), <http://arstechnica.com/information-technology/2016/09/muni-isp-forced-to-shut-off-fiber-to-the-home-internet-after-court-ruling> [<http://perma.cc/5WTC-34KS>].

²⁸¹ See Cecilia Kang, *Broadband Law Could Force Rural Residents Off Information Superhighway*, N.Y. TIMES (Aug. 28, 2016), <http://www.nytimes.com/2016/08/29/technology/broadband-law-could-force-rural-residents-off-information-superhighway.html> [<http://perma.cc/6SF5-TH4Y>].

²⁸² Lisa Gonzalez, *Wilson To Offer Greenlight to Pinetops at No Charge*, COMMUNITY NETWORKS (Oct. 25, 2016), <http://muninetworks.org/content/wilson-offer-greenlight-pinetops-no-charge> [<http://perma.cc/MJZ8-Q5LH>].

whose business relied on the high-speed network, pleaded: “We just can’t go back in time.”²⁸³

After a year of uncertainty, the North Carolina legislature granted Wilson a “temporary extension” that allowed it to use its electric grid to keep providing fiber-optic broadband service to Pinetops and the nearby farm.²⁸⁴ But the bill had a major exception: if any privately owned provider ever offers Pinetops a similar service, Wilson must shut down its service to Pinetops—thus giving any future provider another broadband monopoly, with the right to charge accordingly.

VI. CONCLUSION: PUBLIC BROADBAND’S PATH AHEAD

“I’d hate to sit here and keep bashing AT&T . . . I wouldn’t care if we ever made a dime on this network, as long as it would pay for itself. If it could increase and do the things with education, health, safety, and economic development—man, that’s a win. That’s a huge win.”

—Larry Gates (Utilities Director,
Chanute, Kansas)²⁸⁵

The Sixth Circuit’s 2016 holding in *Tennessee v. FCC* shows that the ghost of *Missouri Municipal League* still haunts the FCC, and prevents it from being the champion of public broadband that former Chairman Wheeler and former President Obama had hoped it could be.

Looking ahead, proponents of public broadband could try to build public networks where it is legal, and fight to meet or overturn restrictions where it is not, including by pushing lawmakers to revive and vote on the Community Broadband Act in Congress. With every effort, they should expect heavy resistance from well-financed ISP lobbies. More “proof-of-concept” success stories like Chattanooga’s may help move political levers.

The new leadership at the FCC, headed by Chairman Pai, does not bode well for the prospect that the FCC will aid cities in deploying public broadband networks. But leadership does

²⁸³ Lisa Gonzalez, “We Just Can’t Go Back in Time”: Pinetops Calls for Repeal of State Law, COMMUNITY NETWORKS (Sep. 23, 2016), <http://muninetworks.org/content/we-just-cant-go-back-time-pinetops-calls-repeal-state-law> [<http://perma.cc/E5QE-P4K3>].

²⁸⁴ Act of July 25, 2017, 2017 N.C. SESS. LAWS 180, <http://www.ncleg.net/Sessions/2017/Bills/House/HTML/H396v4.html> [<http://perma.cc/W73C-ZWGE>].

²⁸⁵ Colin Neagle, *Inside the Tiny Kansas Town Battling Cable Lobbyists over Municipal Broadband*, NETWORK WORLD (Feb. 26, 2014, 6:00 AM), <http://www.networkworld.com/article/2174702/lan-wan/inside-the-tiny-kansas-town-battling-cable-lobbyists-over-municipal-broadband.html> [<http://perma.cc/B64K-Y4WZ>].

change, and perhaps in a few years a “Dragonslayer” will again head the agency and take up this cause. If she does, she should encourage Congress to clarify the meaning of “any entity” in section 253 to include municipally owned utilities. She could ask Congress for an up-or-down vote on whether or not the statute provides the FCC authority to preempt non-neutral state laws that prohibit local governments from providing broadband. Given the widespread bipartisan public support for the right to offer public broadband, national attention could help.

Even if Congress does not take a vote, a recent federal court ruling upholding Title II reclassification of broadband service suggests growing public recognition of the essential nature of broadband service.²⁸⁶ For this reason, the FCC may have more success if it again uses section 253 to selectively preempt state laws that unfairly restrict public broadband. If brought to court, the agency could follow a different approach than it did before the Sixth Circuit. Instead of distinguishing *Missouri Municipal League*, the agency should admit it made a mistake when it denied the Missouri Municipals’ preemption petition in 2004. Given broadband’s subsequent concentration into an oligopoly of providers, and a “crazy quilt” where only some cities can offer broadband and others cannot, the FCC should ask the Court to join the agency in reversing the legacies its twenty-year-old decisions have left.

Like electricity, broadband has grown from a luxury to an essential part of public life. Like electricity, citizens should have the right to choose to pool their resources and entrust their local government to provide it. There are many forms of public broadband, and cities should be able to choose the model that best fits their needs.

When Franklin D. Roosevelt campaigned for Americans’ right to own their own electric utilities, he argued that every big public electric project “will be forever a national yardstick to prevent extortion against the public and to encourage the wider use of that servant of the people— electric power.”²⁸⁷ Publicly funded broadband networks can be the new yardstick to prevent extortion against the public and encourage wider

²⁸⁶ See, e.g., Rebecca R. Ruiz & Steve Lohr, *F.C.C. Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html> [<http://perma.cc/T225-7MYA>] (upholding the FCC’s classification of broadband providers as “common carriers” under Title II); see also WU, *supra* note 162, at 58 (“At the heart of common carriage is the idea that certain businesses are either so intimately connected, even essential, to the public good, or so inherently powerful—imagine the water or electric utilities—that they must be compelled to conduct their affairs in a nondiscriminatory way.”).

²⁸⁷ Roosevelt, *supra* note 7.

Internet use.

So far, public broadband networks have shown that they can deliver high-speed broadband at affordable rates. In areas where a broadband market failed to materialize, it may be time for communities to realize that Roosevelt's "birch rod"²⁸⁸ is a better solution than waiting for the private market to improve on its own.

Public power did not come easy. Public broadband will not come easy, either. But as the number of successful public networks grows, combined with widespread bipartisan public support for these efforts, public broadband advocates have plenty of reasons to see a bright future ahead.

²⁸⁸ *Id.*